TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1930

No. 683

ALFRED SCOTT ALDRIDGE, PETITIONER

vs.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

PETITION FOR CERTIORARI FILED JANUARY 27, 1931
CERTIORARI GRANTED FEBRUARY 16, 1931

SUPREME COURT OF THE UNITED STATES

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1 In Supreme Court of the District of Columbia

UNITED STATES OF AMERICA
vs.
ALFRED SCOTT ALDRIDGE } Criminal No. 48789

[Caption omitted.]

Indictment

Filed in open court September 30, 1929.

The grand jurors of the United States of America, in and for the District of Columbia aforesaid, upon their oath, do present:

That one Alfred Scott Aldridge, late of the District of Columbia aforesaid; on, to wit, July 6, 1929, and at the District of Columbia aforesaid, contriving and intending to kill one Harry J. McDonald, feloniously, wilfully, purposely, and of his deliberate and premeditated malice, in and upon him, the said Harry J. McDonald, then and there being, did make an assault; and that in making the said assault as aforesaid, he, the said Alfred Scott Aldridge, so contriving and intending to kill him, the said Harry J. McDonald, as aforesaid, a certain firearm, of the kind commonly known as and called a pistol, then and there loaded and charged with gunpowder and with metal bullets, and in the right hand of him, the said Alfred Scott Aldridge, then and there had and held, feloniously, wilfully, purposely, and of his deliberate and premeditated malice did discharge and shoot off, at, against, and upon him, the said Harry J. McDonald; and that he, the said Alfred Scott Aldridge, with one of the metal bullets aforesaid, by him out of the pistol aforesaid, then and there by force of the gunpowder aforesaid, discharged and shot off as aforesaid, then and there feloniously, wilfully, purposely, and of his deliberate and premeditated malice, did strike, penetrate and wound him, the said Harry J. McDonald, in and upon the right side of the chest of him, the said Harry J. McDonald; and that he, the said Alfred Scott Aldridge, by such striking, penetrating, and wounding of him, the said Harry J. McDonald, as aforesaid, did thereby then and there feloniously, wilfully, purposely, and of his deliberate and premeditated malice, give to him, the said Harry J. McDonald, in and upon the right side of the chest of him, the said Harry J. McDonald, one mortal wound; of which said mortal wound, he, the said Harry J. McDonald, from the said July 6, 1929, to July 22, 1929, did

2 languish, and languishing did live, on which said July 22, 1929, and at the District of Columbia aforesaid, the said Harry J. McDonald, of the said mortal wound, did die.

And so the grand jurors aforesaid, upon their oath aforesaid, do say:

That he, the said Alfred Scott Aldridge, him, the said Harry J. McDonald, in the manner and by the means aforesaid, feloniously, wilfully, purposely, and of his deliberate and premeditated malice did kill and murder; against the form of the statute in such case made and provided, and against the peace and Government of the said United States.

LEO A. ROVER,
Attorney of the United States in and for the District of Columbia.

(Indorsed:) Criminal No. 48537, United States vs. Alfred Scott Aldridge. Murder in first degree.

Witnesses:

EDWARD T. BEACH,
JACK RAPPAPORT,
EDWARD T. KELLY, M. P.

A true bill:

MERRITT O. CHANCE, *Foreman.*

In Supreme Court of District of Columbia.

Plea in abatement

Filed November 12, 1929

* * * * * * *

Comes now Alfred Scott Aldridge, defendant in the above-captioned cause, in his proper person, and with leave of court first had and obtained, enters this his plea in abatement, and requests that he should not be required to plead to the indictment returned against him herein by an alleged grand jury which was empaneled on July 2, 1929, and for reasons therefor assigns:

1. That the said grand jury was not a lawfully constituted body.

2. That one Dolores Marmion, a member of the grand jury in and for the District of Columbia, empaneled on July 2, 1929, is a pensioner of the United States Government, the plaintiff and a party to this cause of action, and is, therefore, disqualified and unable to sit as a lawful grand juror in a case wherein the United States is a party.

3. This defendant says that by reason of the aforegoing facts the grand jury in and for the District of Columbia which assumed to return the alleged indictment in this case against him was not a legally constituted body and that it had no power to return a valid indictment against this defendant.

Wherefore he prays judgment of the said indictment and that the same may be quashed.

ALFRED SCOTT ALDRIDGE.

[*Duly sworn to by Alfred S. Aldridge; jurat omitted in printing*]

Service of the foregoing plea acknowledged this 11th day of November, 1929.

WALTER M. SHEA,
Asst. United States Attorney in and for the District of Columbia.

In Supreme Court of District of Columbia

Indictment

Filed in open court December 3, 1929

The grand jurors of the United States of America, in and for the District of Columbia aforesaid, upon their oath do present:

That one Alfred Scott Aldridge, late of the District of Columbia aforesaid, on, to wit, the sixth day of July, 1929, and at the District of Columbia aforesaid, contriving and intending to kill one Harry J. McDonald, feloniously, wilfully, purposely, and of his deliberate and premeditated malice, in and upon him, the said Harry J. McDonald, then and there being, did make an assault; and that in making the said assault as aforesaid, he, the said Alfred Scott Aldridge, so contriving and intending to kill him, the said Harry J. McDonald, as aforesaid, a certain firearm, of the kind commonly known as and called a pistol, then and there loaded and charged with gunpowder and with metal bullets, and in the right hand of him, the said Alfred Scott Aldridge, then and there had and held, feloniously, wilfully, purposely, and of his deliberate and premeditated malice did discharge and shoot off, at, against, and upon him, the said Harry J. McDonald; and that he, the said Alfred Scott Aldridge, with one of the metal bullets aforesaid, by him out of the pistol aforesaid, then and there by force of the gunpowder aforesaid, discharged and shot off as aforesaid, then and there feloniously, wilfully, purposely, and of his deliberate and premeditated malice, did strike, penetrate, and wound him, the said Harry J. McDonald, in and upon the right side of the chest of him, the said Harry J. McDonald; and that he, the said Alfred Scott Aldridge, by such striking, penetrating, and wounding of him, the said Harry J. McDonald, as aforesaid, did thereby then and there feloniously, wilfully, purposely, and of his deliberate and premeditated malice give to him, the said Harry J. McDonald, in and upon the right side of the chest of him, the said Harry J. McDonald, one mortal wound, of which said mortal wound, he, the said Harry J. McDonald, from the said sixth day of July, 1929, to the twenty-second day of July, 1929, did languish, and languishing did live, on which
4 said twenty-second day of July, 1929, and at the District of Columbia aforesaid, the said Harry J. McDonald, of the said mortal wound, did die.

And so the grand jurors aforesaid, upon their oath aforesaid, do say:

That he, the said Alfred Scott Aldridge, him, the said Harry J. McDonald, in the manner and by the means aforesaid, feloniously, wilfully, purposely, and of his deliberate and premeditated malice did kill and murder; against the form of the statute in such case made and provided, and against the peace and Government of the said United States.

LEO A. ROVER,
Attorney of the United States in and for the District of Columbia.

(Indorsed:) Crim. No. 48789. United States *vs.* Alfred Scott Aldridge. First degree murder.

Witnesses:

DANIEL L. BORDEN,
EDWARD E. BEACH,
JOHN S. LAYCOCK,
JACK RAPPAPORT,
WILLIAM E. HOLMES, M. P.,
EDWARD J. KELLY, M. P.

A true bill:

JAMES N. FITZPATRICK, Jr.,
Foreman.

In Supreme Court of District of Columbia

Memoranda

December 7, 1929: Arraignment; plea not guilty; entered.
February 26, 1930: Verdict, guilty as indicated.

In Supreme Court of District of Columbia

Motion for a new trial

Filed March 4, 1930

* * * * * * *

Comes now the defendant, by and through his attorney, and respectfully requests the court to set aside and declare for naught the verdict rendered by the jury herein on, to wit, the 27th day of February, 1930, and further respectfully requests this court to grant unto the defendant a new trail herein and for reasons therefor assigns:

1. The verdict was contrary to the evidence.
2. The verdict was contrary to the weight of the evidence.
3. That this court committed error in refusing to examine the jury on their voir dire as to whether any juror may entertain racial prejudices in a matter of a homicide where the defendant is a negro and the deceased a white policeman.

4. That this court erred in admitting in evidence over defendant's exception the bullet alleged to have caused the death of the decedent which was discovered some two or three days subsequent to the homicide at a place far distant from the scene of the homicide.

5. That this court committed error in admitting over the defendant's objection and exception the expert testimony of Detective Sergeant Fowler, when in truth and in fact the witness was not an expert nor was he qualified to act in such a capacity.

6. That this court committed error in refusing to grant the motion of the defendant to withdraw a juror and declare a mistrial when the widow of the decedent fainted on the witness stand and became hysterical in the courtroom upon her examination in chief by the prosecution. Such conduct on the part of this witness was highly prejudicial to this defendant and denied to him his constitutional right of a fair and impartial trial, uninfluenced by passion, prejudice, or sympathy.

7. That this court committed error in admitting in evidence the testimony of Lieutenant Holmes as to statements alleged to have been made by a deceased negro not the victim of the homicide herein involved and such statement accusing the defendant herein of the homicide.

8. That this court erred in not withdrawing from the consideration of the jury the question of the defendant's guilt of first degree murder.

9. The court erred in admitting in evidence the previous criminal record of the defendant.

10. That the court erred in permitting the prosecuting attorney to cross-examine the defendant beyond the scope of the direct examination.

11. The court erred in its instructions to the jury.

12. The court erred in denying certain prayers offered by the defendant.

13. And for other reasons and grounds thereto which will appear upon the oral argument of this motion.

JAMES F. REILLY,
Attorney for the Defendant.

Service of the above motion acknowledged this 4th day of March, 1930.

LEO A. ROVER,
By JOHN C. CONLIFF, JR.

In Supreme Court of District of Columbia

Motion in arrest of judgment

Filed March 4, 1930

* * * * * * *

Comes now the defendant, by and through his attorney, and respectfully requests this court to arrest the judgment heretofore

entered herein on, to wit, the 27th day of February, 1930, and for reasons therefor assigns:

1. That the alleged judgment is null, void, and of no effect.

2. That the United States has failed to comply with section 1033 of the Revised Statutes of the United States requiring them to serve upon the defendant at least two days before trial a certified copy of the pertinent indictment.

6 3. That the judgement of the court herein was entered in the case of the United States of America v. Alfred Scott Aldridge, Criminal No. 48789, which was upon an indictment retuned by the grand jurors in and for the District of Columbia for the October term, 1929, while in truth and in fact this defendant was tried under an indictment returned by the grand jurors in and for the District of Columbia for the July term, 1929.

4. And for other reasons and grounds hereto which will appear upon the oral argument of this motion.

JAMES F. REILLY,
Attorney for Defendant.

Service acknowledged this 4th day of March, 1930.

LEO A. ROVER,
By JOHN C. CONLIFF, Jr.

In Supreme Court of the District of Columbia

Order overruling motions in arrest and for a new trial

MARCH 15, 1930.

The court resumes its session pursuant to adjournment, Mr. Justice GORDON presiding.

* * * * * * *

Come as well the attorney of the United States, as the defendant herein by his attorney, James F. Reilly, Esquire; and thereupon the defendant's motion in arrest of judgment and motion for a new trial coming on to be heard, after argument by the counsel are by the court overruled, to which action of the court the defendant by his attorney prays an exception which is noted.

In Supreme Court of District of Columbia

Sentence

MARCH 17, 1930.

The court resumes its session pursuant to adjournment, Mr. Justice GORDON presiding.

* * * * * * *

Come as well the attorney of the United States, as the defendant in proper person, in custody of the superintendent of the Washington Asylum and Jail and by his attorney, James F. Reilly, Esquire;

and thereupon it is demanded of the defendant what further he has to say why the sentence of the law should not be pronounced against him, and he says nothing except as he has already said; whereupon the sentence is pronounced as follows:

It is considered by the court, and the sentence of the law is that you, Alfred Scott Aldridge, for the offense of murder in the first degree whereof you have been found guilty, be and you are hereby sentenced to the punishment of death by electrocution; and it is

Ordered that you, Alfred Scott Aldridge, be forthwith taken to the Washington Asylum and Jail, otherwise known as the District Jail, in the District of Columbia, from whence you came, and there be kept in close confinement; and that on the 19th day June, A. D. 1930, you be taken to the place prepared for your execution within the walls of the said Washington Asylum and Jail, and that
7 then and there, between the hours of ten o'clock antemeridian and two o'clock postmeridian, you be electrocuted by the causing to pass through your body a current of electricity of sufficient intensity to cause your death, and that the application of such current shall be continued until you are dead, and may God have mercy on your soul.

It is further ordered that a certified copy of this sentence shall be transmitted by the clerk of the Supreme Court of the District of Columbia to the superintendent of the aforesaid Washington Asylum and Jail not less than ten days prior to the time fixed in this sentence of the court for the execution of the same.

Signed this 17th day of March, A. D. 1930.

PEYTON GORDON, *Justice.*

to which action of the court the defendant by his attorney prays an exception which is noted; and thereupon the defendant, by his attorney, notes an appeal to the Court of Appeals of the District of Columbia from the judgment of the court in this case; whereupon the court fixes the amount of bond for costs on appeal at one hundred dollars or fifty dollars in cash.

In Supreme Court of District of Columbia

Memorandum

March 20, 1930: Cost bond on appeal approved and filed.

In Supreme Court of District of Columbia

Assignment of errors

Filed April 2, 1930

* * * * * * *

Comes now the defendant, by his attorney, and assigns as error committed by the court during the trial of the above-entitled cause, the following:

1. The court's action in refusing the request of the defendant to propound to the jury during the court's examination of the jury on its voir dire as to whether any juror may entertain racial prejudice in the matter of a homicide where the defendant is a negro and the deceased a white policeman.

2. The court's action in admitting in evidence Government Exhibit No. 5, which is the bullet alleged to have caused the death of the decedent.

3. The court's action in permitting the witness, John H. Fowler, to testify as an expert.

4. The court's action in refusing to grant the motion of the defendant to withdraw a juror and declare a mistrial when the widow of the decedent fainted on the witness stand and became hysterical in the courtroom.

5. The court's action in admitting in evidence the testimony of the witness Holmes as to statements made by the defendant's brother.

6. The court's action in refusing to withdraw from the consideration of the jury the question of the defendants' guilt of first degree murder.

7. The court's action in refusing to exclude the previous criminal record of the defendant.

8 8. The court's action in refusing to instruct the jury as requested by the defendant in Prayer No. 2 offered by the defendant.

9. The court's action in refusing to instruct the jury as requested by the defendant in Prayer No. 5 offered by the defendant.

10. The court's action in refusing to instruct the jury as requested by the defendant in Prayer No. 6 offered by the defendant.

11. The court's action in refusing to instruct the jury as requested by the defendant in Prayer No. 10 offered by the defendant.

12. The failure of the court to instruct the jury on the question of manslaughter.

13. The court's action in instructing the jury relative to accusatory statements made against the defendant.

14. The court's action in permitting the jury to return its verdict upon indictment #48-789.

JAMES F. REILLY,
Attorney for the Defendant.

Service of the foregoing assignment of errors acknowledged this 2nd day of April, 1930.

LEO A. ROVER (by KEOGH),
United States Attorney.

In Supreme Court of District of Columbia

Memorandum

April 5, 1930: Proposed bill of exceptions filed.

April 29, 1930: Order extending time to submit bill of exceptions to and including May 20, 1930, filed.

May 20, 1930: Order extending time to submit bill of exceptions further extended to and including June 2, 1930.

In Supreme Court of District of Columbia

Designation of record

Filed April 2, 1930

* * * * * * *

The defendant, Alfred Scott Aldridge, having perfected an appeal to the Court of Appeals of the District of Columbia, in the above-entitled cause, respectfully requests the clerk of this court to prepare for and make part of the transcript of record in this cause the following papers and proceedings.

1. Indictment returned by the grand jury in and for the District of Columbia for the July term, A. D. 1929, numbered #48,537.
2. Plea in abatement filed thereto.
3. Indictment returned by the grand jury in and for the District of Columbia for the October term, A. D. 1929, numbered #48,789.
4. Memorandum, plea of "not guilty."
5. Bill of exceptions.
6. Verdict.
7. Motion for new trial.
8. Motion in arrest of judgment.
9. Memorandum, judgment of court overruling motion for new trial and motion in arrest of judgment.
10. Judgment and sentence of court.
11. Memorandum—Appeal in open court.
12. Appeal bond.
13. Assignment of errors.
14. This designation.

JAMES F. REILLY,
Attorney for Defendant.

Service of a copy of the foregoing designation of record acknowledged this 2nd day of April, A. D. 1930.

LEO A. ROVER (by KROOH),
U. S. Attorney in and for the District of Columbia.

In Supreme Court of the District of Columbia

Order making bill of exceptions part of record

JUNE 2, 1930.

The court resumes its session pursuant to adjournment, Mr. Justice Gordon, presiding.

* * * * * * *

Now comes here the defendant by his attorney, James F. Reilly, Esquire, and prays the court to sign and make a part of the record his bill of exceptions taken during the trial of the case and filed

with the court on the 5" day of April, 1930, which is accordingly done.

[Clerk's certificate to foregoing transcript omitted in printing.]

In Supreme Court of the District of Columbia holding a criminal term

THE UNITED STATES OF AMERICA
vs.
ALFRED SCOTT ALDRIDGE
No. 48789

Bill of exceptions

Be it remembered that this cause came on for trial on February 26, 1930, before Mr. Justice Peyton Gordon, in Criminal Court
10 No. 1. The Government was represented by Walter M. Shea, Esquire, and James R. Kirkland, Esquire, Assistant United States District Attorneys, and the defendant was represented by James F. Reilly, Esquire.

Whereupon, after identification by counsel for the Government, the court proceded to examine the jury on their voir dire, and in qualifying the jury inquired if any of them knew the defendant, Alfred Scott Aldrige, or his counsel, or any of the witnesses whose names have been called. The court further inquired if any of the prospective jurors knew any of the facts in the case or if any of them ever remembered having read of it in the newspaper, or if they had any prejudice or bias against circumstantial evidence, or if any of the prospective jurors had any conscientious scruples against capital punishment. The court further inquired if any prospective juror had formed or exercised an opinion as to the guilt or innocence of the defendant, and further inquired whether any prospective juror was acquainted with any member of the Metropolitan Police Force of the District of Columbia, or more particularly those attached to the third precinct.

Whereupon, with the consent of the court, counsel for the parties hereto approached the bench and in a whispered tone, out of the hearing of the prospective jurors, the following took place:

Mr. REILLY. At the last trial of this case I understand there was one woman on the jury who was a southerner, and who said that the fact that the defendant was a negro and the deceased a white man perhaps somewhat influenced her. I don't like to ask that question in public, but——

The COURT. I don't think that would be a proper question, any more than to ask whether they like an Irishman or a Scotchman.

Mr. REILLY. But it was brought to our attention so prominently. It is a racial question——

The COURT. It was not this jury.

Mr. REILLY. No. But it was a racial question, and the question came up——

The COURT. I don't think that is proper.

Mr. REILLY. Might I, out of an abundance of caution, note an exception.

The COURT. Note an exception.

Counsel for the defendant requested the court to allow the record to show that the question relative to racial prejudice be propounded to each and every prospective juror, with the exception heretofore noted on behalf of the defendant. Both sides being contented with the jury as constituted, they were duly sworn to try the cause. The Government exercised four peremptory challenges, the defense five. Counsel for the Government and counsel for the defendant made their opening statements.

Whereupon, to maintain the issues joined herein, the prosecution placed upon the stand, Dr. LEONARD D. MCCARTHY, who was called as a witness for and on behalf of the United States and, having been first duly sworn, was examined and testified as follows: That he was a member of the staff of Emergency Hospital at Washington, D. C., and was so in the month of July, 1929; that the witness was acquainted with Harry J. McDonald, the decedent herein, dur-
11 ing the lifetime of the decedent; that on the 23rd day of July, 1929, he was present at Taltavull's Undertaking Parlors in the District of Columbia; that at that time he saw the body of Harry J. McDonald and identified it as such to the deputy coroner, Dr. Joseph D. Rogers, and that in the presence of the witness a post mortem was performed.

Upon cross-examination by counsel for the defendant, the witness stated that he was at the hospital on July 6, 1929, at the time Harry J. McDonald was brought in.

Whereupon, Dr. JOHN EDWARD MCLAIN was called as a witness for and on behalf of the United States and, having been first duly sworn, was examined and testified as follows: That he was a member of the staff of Emergency Hospital, Washington, D. C., and was such in the month of July, 1929; that he was on duty in the early morning of July 6, 1929, when one Harry J. McDonald was brought to the hospital; that it occurred at about 4.30 a. m., and that the witness at that time examined him; that his examination disclosed two wounds on the chest, on the right rather high up, and the witness thereupon indicated upon the body of the prosecutor the location of the wounds that were upon the body of the decedent; that one wound was in the upper right chest of the decedent and the other in the back, some distance below the other. The witness further testified that he had seen similar wounds before and was familiar with the type of wound; that in his opinion they were wounds that could have been caused by a bullet; that Harry J. McDonald remained at the hospital until approximately July 22, 1929, on which date he died.

On cross-examination the witness testified that he had been at the hospital for approximately three years and had been doing interne work during the entire three years; that the location of the bullet

wound was about the third interspace, that is, between the third and fourth ribs; that the path of the bullet was through the ribs, through the muscles between the ribs, through the pleura, which is the lining inside of the ribs, and then the pleura again, and out behind through the muscles and the skin; that the bullet took a downward course; that it entered on the right shoulder about three or four inches from the center line of the body. The witness further testified that the decedent entered the hospital at about 4.30 a. m., July 6, 1929; that the witness did not see the decedent frequently during that time, but only about three or four times; that the last occasion on which the witness saw the decedent was about four or five days before his death, which was approximately on the 17th or 18th of July, 1929.

Whereupon, the court requested the purpose of the cross-examination, and counsel for the defendant stated that it might be possible to show that something else besides the bullet wound caused the death. The witness thereupon stated that other doctors were in attendance upon the decedent during his illness, but not while he was there. The witness testified that Dr. Sager, Dr. Atkinson, and Dr. Borden were the attending physicians. He further testified that he did not see the decedent sitting up, but he saw him at a time when the back rest was partly elevated; that such elevation occurred on approximately the 17th or 18th day of July, 1929. The witness further testified that he knew not whether the wound in the
12 front of the decedent, which was the point of entrance of the bullet, and the wound in the rear of the decedent was caused by one bullet. The witness further testified that he did not see the bullet at any time.

Whereupon, Dr. JOSEPH D. ROGERS, was called as a witness for and on behalf of the United States and, having been first duly sworn, was examined and testified as follows: That he was a deputy coroner of the District of Columbia and a practicing physician therein for a period of approximately 25 years; that he was so during the month of July, 1929, and that on July 23rd he was at Taltavull's Undertaking Parlors in the District of Columbia, and the body was identified to him as being the body of Harry J. McDonald, and that it was identified to him by Dr. Kilroy and Dr. Leonard B. McCarthy; that the witness at that time performed an autopsy upon the body of the decedent, which disclosed the following:

A. The examination showed a white man about 28 years of age, weighing about 200 pounds, height about 6 feet 2 inches. He had a bullet wound in the chest about two inches from the mid line——

Q. Do you mind showing on me, Doctor?

A. Entered between the second and third ribs, going down through the right lung, and out at the seventh rib, down this way [indicating], four inches from here [indicating]. From here to here [indicating], and the seventh, from here to here [indicating]. There had been hemorrhage from that lung, considerable hemorrhage. But on the left side there was an embolus in the lower lobe of the left lung—

that is, an embolus that was due to some infected material that had been carried there and plugged off the left lung as a result of this wound on the right side.

Q. I will ask you if those two wounds were caused by the same bullet?

A. Yes, sir.

Q. That was the course of the bullet through the body?

A. Yes, sir.

Q. Now, what was the cause of death, Doctor?

A. Bullet wound of the right lung, with hemorrhage, infection, and embolus of the left lung as a result of the regional bullet wound.

Q. All attributable to the bullet wound that you have described?

A. Yes, sir.

Upon cross-examination the witness testified that the autopsy was performed on July 23, 1929, in the presence of Doctor Kilroy and Doctor McCarthy and some of the men at the undertaking establishment; that the course of the bullet was about two and a half inches from the mid line, between the second and third ribs, taking a downward course, through the right lung, and out four inches from the spine, at the level of the seventh rib. He further testified that the decedent died from an embolism caused by a gunshot wound.

Whereupon, EDWARD THEODORE BEACH was called as a witness for and on behalf of the United States and, having been first duly sworn, was examined and testified as follows:

That he was employed by the Chevy Chase Dairy and was so employed on July 6, 1929; that he was in the vicinity of 17th and Q Streets, Washington, D. C., about 3 o'clock a. m., and that he first saw the defendant at Church Street, and then at about 3.30 a. m. he saw him at 17th and Q Streets; that no one was with the wit-
13 ness at that time; that over the objection and exception of the defense, the witness stated that he saw another fellow with him at the time; that the other fellow was walking up and down the street, and that a drug store is located on the corner, but was not open for business at that time; that the defendant was inside the drug store; that one Laycock was with the witness at that time and was employed the same as the witness; that the witness was working on his milk route at the time; that when the witness saw one man outside and another inside the drug store he went to the apartment at 16th and Q Streets and telephoned the police; that they subsequently returned to 17th and Q Streets, and that the defendant and the other had come out of the drug store and started east on Q Street; that he saw Officer McDonald there on the morning in question at about 3.55 a. m.; that at that time McDonald was in a Ford touring car and was the only man in the automobile; that there were other police officers who arrived there at about the same time as McDonald, who were also in a Ford; that the witness had a conversation with those officers, and that as a result of the conversation McDonald started north on 17th Street and the other officers east on Q Street; that the

witness saw McDonald when he returned to 17th and Q Streets about five minutes after he left; that he came down 17th Street, and the defendant and another man were with him; that the other man was the same person he saw at the drug store; that the automobile of McDonald, with the defendant and another therein, stopped at about the building line on the 17th Street side of the northeast corner of 17th and Q Streets; that all of the parties were sitting in the front seat of the automobile; that the defendant was seated on the outside farthest away from the driver; that the other person was seated in the middle and McDonald was driving the automobile; that as the car stopped and McDonald was pulling on the brake a shot was fired; that it was fired in the machine, and that all three persons were present in the car at that time; that the defendant then was the first to jump out of the automobile and run west on Q Street; that he had a pistol in his hand, and the other negro was the second man out of the automobile and ran north on 17th Street for a distance of about ten feet; that McDonald followed him out of the car and shot at the defendant first while the defendant was going west on Q Street; that McDonald was at that time staggering, and the witness could tell from his actions that he had been shot; that McDonald then shot the fellow going north on 17th Street, and that he did not have to move far to shoot at the defendant, and that to the best of the witness's recollection it was about two feet; that after shooting at the defendant McDonald shot at the other fellow who was going north on 17th Street; that the other person at that time stopped but did not fall; that McDonald then shot at the defendant again after the other man stopped; that McDonald then shot at the man going north on 17th Street, and that he (the other man) then fell; that the witness and a man, Rappaport, then put McDonald in an automobile and took him to the hospital. The witness stated that McDonald had his gun with him when he got into the automobile and that they immediately proceeded to take the officer to Emergency Hospital. The witness further testified that the defendant had a hat on at the time it happened, and being shown a hat testified that it looked
14 like the hat he had on at the time of the shooting. The witness further testified that the man who went north on 17th Street also had a gun; that it was in his hand; that after the defendant and the other got out of the automobile he did not see either of them shoot, but that the officer did; that the only shot other than those fired at the officer was the one inside of the car. The witness further testified that he did not hear anything said at the time while they were all there together—that is, the defendant, the other fellow, and the officer; that the last time he saw the defendant on that particular morning was when the defendant was running west on Q Street; that two days later he saw him at the third police precinct and there identified him as the person he had seen.

Upon cross-examination the witness testified that this was about 4.30 in the morning; that he first saw the automobile containing Officer McDonald coming south on Q Street, and that at that time

he was crossing the street from the drug store; that the automobile was about twenty feet north on 17th Street at the time he first noticed it and that it was about 20 feet west of the witness. The witness further testified that he was very near to the car when it stopped and at the time it did stop he was walking across the street; that the position of the occupants of the automobile was that of the officer was driving, the defendant was on the extreme right, and the other man, the deceased negro, in the middle; that it was a Ford automobile of the old type. The witness was unable to recall whether the officer had his arm on the wheel at the time or not and did not recall that he was attempting to pull up on the brake in order to stop the automobile; that he was unable to see how wide the seat of the automobile may have been. The witness further stated that he did not know if the occupants were crowded. The witness thereupon stated that this was about 4.30 a. m. in the early part of July, and that the street lamps were at that time on; that there was a street lamp on the corner where the car stopped and another on each of the two other corners, but none on the third; that the lamps were regular street lamps and were bright enough to see very well; that the automobile driven by McDonald was a regular sedan, and the witness could see nothing but the upper portion of the bodies of the occupants; that the witness was unable to state what, if anything, was going on in the automobile; that he heard no words said at the time the automobile was coming down 17th and Q Streets, and that of his own knowledge he did not know who fired the shot. The witness further testified that there were about six people on the corner at that time, but that no officers were there. The witness further testified that he did not see the defendant stumble, if he stumbled, when he got out of the automobile. The witness further testified that at the time he heard the shot the automobile was just coming to a stop but had not completely stopped.

Whereupon, ROBERT C. PIERCE was called as a witness for and on behalf of the United States and, having been first duly sworn, was examined and testified as follows:

That he was a member of the Metropolitan Police Department and assigned to the third precinct, and that he was so assigned on the 6th day of July, 1929; that on this particular morning he was
15 working from 12 o'clock midnight until 8 o'clock a. m. That he knew Harry J. McDonald during his lifetime, and that he was a member of the Metropolitan Police Department, attached to the same precinct as the witness, and was also working from 12 o'clock midnight until 8 o'clock a. m., July 6, 1929. That at about 4 or 4.30 a. m. he saw McDonald at 17th and Q Streets; that he saw him first at the precinct and later at 17th and Q Streets; that they were both at the precinct when he first saw him; that both left the precinct at about the same time, but that McDonald left in his own car, and that no one went with him; that Officer Kelly left with the witness; that they went directly to 17th and Q Streets northwest, and

there saw Officer McDonald; that they stayed there approximately two or three minutes, and there the witness had a conversation with certain people. The witness testified that he knew Mr. Beach, and the witness then had a conversation with McDonald and then started north on 17th Street with Officer Kelly in a police automobile; that McDonald followed them north on 17th Street as far as Corcoran and then split. The witness stated that about ten minutes later he returned to 17th and Q Streets; that the next time he saw McDonald was at the hospital the next morning; that he was not at 17th and Q Streets when the witness returned there. The witness further testified that he saw McDonald's Ford sedan headed at an angle on the west side of 17th Street, just about at the cross-walk intersection; that no one was in McDonald's car at that time and that about 15 feet north, on 17th Street, the witness saw a colored man lying on his side or stomach, bleeding. He was lying on a parking near the curb; that he was bleeding so much he seemed to be choking in his own blood; that he was lying on his face and could not breathe good, so they rolled him over on his side in order to enable him to breathe more freely. The witness being asked what, if anything, was done with Officer McDonald's car, replied, "It was driven to No. 3 police precinct." The witness was thereupon handed a black hat, which was marked Government Exhibit for Identification No. 2; that the witness was able to identify it and stated that it was a fedora hat that he found west of the corner of 17th and Q Streets on the sidewalk right back of McDonald's car. The witness was then questioned by the court if he saw Officer McDonald's automobile when it was removed from 17th and Q Streets. He replied that he did not but that he saw it three-quarters of an hour later at the precinct. The witness further testified that the man, who was lying on his face about 15 feet north of the rear of McDonald's car, was rolled over by Officer Jackson, who was also attached to the third precinct. The witness further testified that at the time Officer McDonald was in full police uniform.

Upon cross-examination the witness stated that MacDonald's automobile was an old Ford sedan; that he did not know how wide the seat was; that the hand brake was on the left side of the driver; and that the colored man who subsequently died was about 25 or 30 feet from the sidewalk, or about 15 feet from the rear of the automobile; that the man was bleeding rather profusely, but the witness did not know whether from the mouth, or face, or neck. The witness further testified that he did not see anything in his possession at that time, but others were there before him.

16 Whereupon, LAWRENCE L. JACKSON was called as a witness for and on behalf of the United States and, having been first duly sworn, was examined and testified as follows:

That he was a member of the Metropolitan police department, assigned to No. 3 precinct; that he was so assigned and employed on July 6, 1929; that he worked from 12 o'clock midnight until 8 o'clock in the morning on that particular day; that between 4 and

4.30 he was in the vicinity of 17th and Q Streets, but went there in the reserve wagon; that when he arrived he saw a man lying on 17th Street in the second tree box on the west side of the street and saw several people congregated there; that the man lying in the street was a colored man; that he was lying with his face down and seemed as though he was lying in a bloody spot and breathing awfully hard; that he was struggling to get his breath; that the witness turned him over so he could get his breath; that he seemed like he was drowning. The witness thereupon turned him over and he had an automatic pistol in his hand; that he dropped it as he turned him over and that it was in his right hand. The witness was thereupon shown Government Exhibit No. 4, which he identified as the gun that he took from the man lying in the street; that he observed it at that time, took it out of his hand, smelled it, and over objection of the defendant he stated that it had never been fired. Thereupon the prosecutor inquired of him if he smelled it and he replied that he had. He was then asked if the weapon was fired, and counsel for the defendant at this time requested that his answer be stricken. Without a ruling by the court, the witness continued his testimony and stated that he could smell the powder if there had been powder, and being interrupted by the prosecuting attorney he stated that he was familiar with guns that had been recently fired and had been a police officer for approximately 12 years and had carried a gun all of that time, but was not familiar with firearms. Thereupon counsel for the defendant maintained his objection, which was overruled and an exception duly noted. The witness thereupon stated that after examining the pistol he wrapped it in a newspaper and kept it 5 or 10 minutes. The court thereupon inquired of the witness whether the pistol that he smelled had been fired or not, and he responded it had not been. The witness thereupon stated that he did not examine the magazine at all but wrapped it in a piece of newspaper and turned it over to Detective Trammel, a detective sergeant assigned to the detective bureau, and that he turned it over to him about 5 minutes after he received it, in the same condition as when he picked it up. That the court at that time asked the witness where he was when he turned it over to Trammel and he replied, "Right beside the man that was shot." The witness thereupon stated that the injured man was at that time picked up and taken to the hospital in No. 3 police wagon, but that the witness did not go with him.

Upon cross-examination the witness stated that at the time he was at 17th and Q Streets he did not know whether he saw McDonald's automobile or not; that the man was lying at the corner of 17th and Q Streets at about the second tree box, which was about 25 yards from the building line. The witness then stated that he did not know where the wounds were upon the injured negro, but
17 that there was blood on his face; that at the time he turned him over he found the pistol next to his stomach, but that he did not have it clutched; that as soon as he arrived on the scene he

got out of the wagon and walked over to where the man was; that there were not so many people in the neighborhood at the time; that it was just breaking daylight; that it was not so dark but that it was light enough to see clearly for 25 yards.

Whereupon, JACK RAPPAPORT was called as a witness on behalf of the United States and, having been first duly sworn, was examined and testified as follows:

That he lived at 1700 Q Street NW., in the District of Columbia, and that such number was the southwest corner of 17th and Q Streets, and that he was living there during the month of July, 1929; that he was employed as a linotype operator by the Evening Star, and that his work requires him to work late at night and early morning; that he was so employed and working on the night of July 5, 1929, and the early morning of July 6th; that he returned to his home at about 4.15 a. m. July 6, 1929; that at that time he was coming south on 17th Street; that he proceeded to the intersection of 17th and Q Streets, turned a corner, and noticed a car parked on the other side of the street; that one car contained Officer McDonald; that he also saw another automobile which contained two officers; that the witness noticed Officer McDonald give him a hard look, and not knowing what it was about he turned the corner, went into an alley, stopped his car, and went over to the one which was across the street from where he lived, on the corner where the drug store was located; that on the northeast corner of 17th and Q Streets there is a police call box, which is the same corner on which the drug store is located. The witness then saw Officer McDonald, who was in an automobile, proceed north on 17th Street, and that the other car with two officers in it proceeded east on Q Street; that in approximately five minutes he saw Officer McDonald coming south on 17th Street; that there were three in his automobile at that time, including McDonald himself; that the defendant was one of those persons; that he was sitting on the outside of the car; that all of the occupants of the automobile were in the front seat and that Officer McDonald was driving the car; that the other man was between Officer McDonald and the defendant, and that as the car approached the intersection it was coming to a stop; that as the car was coming to a stop the witness walked over towards it, and he heard a shot fired; that it was fired in the automobile, and that the first man out, who was the defendant, started to run west on Q Street; that the other man started to run north on 17th Street; that McDonald fired two shots shortly after the first shot was fired. The witness then stated that the first two shots must have been fired while he was inside of the automobile; that the witness was on the east side of the automobile at the time the shots were fired and that the occupants of the automobile got out on the other side; that McDonald got out and while he was out he fired other shots; that at the time of the shooting the witness was about two feet from the automobile, and upon being questioned he stated that by his last answer he meant

when the shot was fired on the inside of the automobile. The witness thereupon stated that he did not know who fired the first
18 shot, and that when that happened he was two feet from the east side of the car. The witness thereupon stated that the first shot was fired and then there were two more; that he did not recall on which side the officer got out; at any rate, he fired about five shots after he got out. That the witness then pursued the defendant about 75 feet west on Q Street and then stopped. The witness thereupon stated that the man who got out of the automobile second ran or tried to run; that he ran about three or four feet and was shot by Officer McDonald; that he did not see either the defendant or the colored man fire any shots after they got out of the car; that after the shooting the witness ran back and noticed that the officer was wounded, and together with the witness Beach and the witness Laycock, put Officer McDonald in his automobile and took him to the hospital; that the officer at that time had a gun in his possession; that he had it in his hand at that time; that when the officer was in the receiving room of Emergency Hospital he called for his gun, and the witness then went back to his automobile, got it, brought it in, and laid it on the seat of the receiving room. The witness thereupon stated that he did not see the defendant until four or five days later, when he saw him at No. 3 police precinct; that he then identified him as the man he had seen on the morning in question under the circumstances which he related.

Upon cross-examination the witness stated that on the particular morning it was about 4.15 a. m. and was just about breaking dawn; that to the best of his recollection the lights were out at that time; that at the time he was on the northeast corner of 17th and Q Streets, which is a drug-store corner; he noticed an automobile coming south on 17th Street, which subsequently developed to be Officer McDonald's automobile; that he could see a good distance up 17th Street, and that at the time he first noticed it it was approximately a block away; that at the time he first noticed it he could not identify the parties that were in the automobile; that his attention was drawn to the automobile at the time it was coming to a stop; that it stopped about 30 or 35 feet from the corner, and that when it came to a stop or was about to come to a stop he was about two feet from the automobile; that at the time he could not possibly identify those who were in the automobile, and at that time he could not see if any of the occupants had a gun; that he could see nothing but the upper portion of the bodies of the parties in the automobile; that to the best of his recollection he could not state whether the automobile had stopped prior to the shot that he heard or whether it had just come to a stop; that the witness was of the impression that the occupants of the automobile were crowded; that the officer had his arms on the steering wheel at the time; that he did not notice whether the officer had his left hand on the brake or not; that the defendant was the first of the occupants to get out of the automo-

bile; that in a matter of seconds the the other negro also got out, and then in another second or two, the officer got out; that when the officer got out he had his gun in his hand and started shooting; that the defendant ran west on Q Street and that the second man out of the car ran north on 17th Street, and the officer shot at the man running west on Q Street; that the witness did not notice whether the second man had a gun or not; that of his own personal knowledge he did not know who fired the gun in the automobile, and that
19 of his own personal knowledge he did not know who fired the shot that killed McDonald.

Upon redirect examination the witness stated that the shot he first heard was fired in the car before any of the passengers got out.

Whereupon, JOHN J. FITZPATRICK was called as a witness on behalf of the United States and, having been first duly sworn, was examined and testified as follows:

That he was a member of the Metropolitan police department, and assigned to the third precinct during the month of July, 1929; that on July 6th, 1929, his tour or shift of duty was from twelve midnight until eight a. m.; that on this occasion he was in charge of the patrol wagon of the precinct, and that on July 6, 1929, between the hours of 4 and 4.30 a. m. he had occasion to go to 17th and Q Streets NW., which was located in the third precinct; that upon arriving there he saw a colored man lying face down on the west side of 17th Street, just north of Q Street, at or near the first tree; that the colored man was taken to Emergency Hospital. Witness further testified that he knew Officer Jackson, and that he was the reserve wagon driver in the third precinct on this particular occasion; that he was on the scene at the same time with the witness, and that Officer Jackson raised the colored man, who was lying on the street, up; and the witness testified "we saw this gun clutched in his hand," and that Officer Jackson took the gun out of his hand; that the injured man was at that time put in the patrol wagon and taken to Emergency Hospital; that the gun was exposed at the time the body was turned or lifted and was open to view in his hand.

Upon cross-examination the witness testified that the body was lying on the ground between the first and second tree boxes, about 50 feet from the northwest curb of the intersection. He further testified that the injured man was bleeding from the front of the neck.

Whereupon, JOHN S. LAYCOCK was called as a witness on behalf of the United States and, having been first duly sworn, was examined and testified as follows:

That he was employed by the Chevy Chase Dairy, and that he had a milk route for that company; that he was so employed during the month of July, 1929, and was working in the early morning of July 6, 1929; that he knew Edward Beach, who was employed in the same manner as the witness; that he saw him about four o'clock on the morning of July 6th on Q Street, between 16th and 17th; that, together with the aforesaid Beach, the witness went back to Church

Street, and from there to 17th and Q Streets NW.; that while in that vicinity he saw the defendant at the drug store on 17th and Q Streets; that another fellow was with the defendant at that time. Witness further testified that he observed the men come out of the drug store, and by "the men" he meant the defendant and his brother; that he saw them go out Q Street towards 16th Street, and then the witness, together with Beach, followed them for awhile; that about fifteen minutes later the witness saw Officer McDonald at 17th and Q Streets; that McDonald was travelling in a Ford automobile, and that he also saw other police officers in the vicinity at that time; that the other officers were also in another automobile; that McDonald went away and left the corner at that time, and the other officers did likewise; that shortly thereafter, in about five or ten minutes, McDonald returned, and two men were with him in the car at the time; that the defendant was one of them; that all three of them were seated in the front seat; that Officer McDonald was driving the automobile and the defendant was on the outside, and the other man in the middle; that they came down 17th Street and the car stopped on the northwest corner of 17th and Q; that it stopped at or about the building line; that at or about the time the car stopped the witness heard a shot, and the shot came from the automobile; that all three persons were in the car at that time; that after the witness heard the shot all of the occupants started out; that the defendant was the first out of the car, that the colored man in the middle was the next, and the defendant ran out Q Street towards 18th, which is west on Q Street; that he started running immediately upon alighting from the car, and the other man started north on 17th Street; that the officer started shooting; that he did so, to the best of the witness' recollection, when he had gotten out of the car. The witness stated that at the time of the shooting he was about in the middle of 17th Street; that the officer was staggering at the time, and McDonald shot at the one going north on 17th Street. The witness stated that the man going north on 17th Street was able to go 10 or 15 feet before he was shot, and upon being shot he fell; that Mr. Beach and Mr. Rappaport then held the officer and took him to the hospital; that the witness next saw the defendant a couple of days later at the third precinct, and there identified him as the man he had seen on the morning of the 6th.

Upon cross-examination the witness testified that he was standing on the northeast corner of 17th and Q Streets when he first noticed the automobile driven by Officer McDonald approaching; that at that time the automobile was just across the street, about 20 or 30 feet away; that it was getting along towards daybreak, and the witness was unable to recall whether the street lights were on at that time. Witness further testified that he could not identify the occupants of the car as it stopped. He testified that he saw the automobile coming down the street, and as it stopped he started walking towards it; that he could not remember who walked with him, and that he was about at the middle of the street when the automobile

stopped; that at that time he could identify the occupants of the automobile, and that the defendant was on the end of the seat; that he, the defendant, right away got out of the automobile and that, of the witness' own personal knowledge, he did not know who fired the shot; that of his own personal knowledge he could not tell whether the occupants had guns at that particular time or not; that he did not know whether had a gun; that he did not notice whether he stumbled at the time he got out of the automobile or not. Witness further testified that the officer, while shooting, was standing right near the automobile, which was about at the building line. He then testified that the man who was lying on the street was about 10 or 15 feet from the automobile; that Officer McDonald shot at this man about twice.

21 Whereupon, CURTIS H. TRAMMELL was called as a witness on behalf of the United States and, having been first duly sworn, was examined and testified as follows:

That he was a member of the Metropolitan police department and assigned to the detective bureau; that he was a detective sergeant; that he was so assigned during the month of July, 1929, and that he worked from twelve midnight until eight a. m. on the night of the 6th; that while he was so on duty he had occasion to go to 17th and Q Streets NW.; that it was sometime between four and 4.30 a. m.; that he knew Officer Jackson, who was the reserve wagon driver of the third precinct, and that he saw him there on that particular morning; that when the witness first arrived there the other officers were putting a man in the wagon and getting him ready to send him away; that the man was a colored man and had been shot; that Officer Jackson at that time turned the gun over to the witness, which was marked "Government Exhibit No. 4 for Identification," which the witness was able to identify as the gun he had received from Officer Jackson; that he did not examine it at that time and that he later turned the gun over to Detective Fowler at Emergency Hospital. The witness also stated that "Government Exhibit No. 4 for Identification" was in the same condition when he turned it over to Detective Fowler as when he received it from Officer Jackson; that this occurred about one hour later; that it had been in his possession from the time he received it from Jackson until he turned it over to Fowler; that Fowler unloaded the gun when it was handed to him, in the presence of the witness; that the gun had one bullet in the chamber thereof, and seven in the magazine; that it was fully loaded.

Whereupon, Mrs. McDonald was called from the witness room, and the following occurred.

Mr. REILLY. May it please the court. Before that witness is called may counsel for the Government and I approach the bench on that?

The COURT. Yes.

(Thereupon counsel for both sides approached the bench and the following proceedings were had at the bench out of the hearing of the jury:)

Mr. REILLY. Your honor undoubtedly remembers what happened when Mrs. McDonald took the stand the other time. In order to give to the defendant a fair and impartial trial, without running the chances of passion or prejudice or sympathy getting into it, I ask the court at this time if outside of the presence of the jury counsel may examine both on direct and cross examination the witness, and then after she has finished testifying allow that to be read to the jury? I say that in order to——

The COURT. When did you ever hear of any such thing?

Mr. REILLY. I have never heard of it, may it please the court, but I know this: I know that if Mrs. McDonald takes the stand it will probably be the same situation as it was the last time. I think that that will put into the jury sympathy and will deprive this defendant of a fair and impartial trial.

The COURT. The Government can not take depositions even with the consent of the defendant.

22 Mr. SHEA. The Government can not take depositions even with the consent of the defendant; they have to be confronted with the witnesses.

Mr. REILLY. I know in the Busch case it was done, may it please the court.

Mr. SHEA. What case?

Mr. REILLY. In the Busch case it was done.

The COURT. What was done?

Mr. SHEA. They merely stipulated as to her testimony.

Mr. REILLY. Well, we can do that.

Mr. SHEA. All she did was to identify the body.

The COURT. That is a different thing. You could stipulate that the man is dead, that is all. But of course I do not want to have any scene here.

Mr. SHEA. I do not either, and hope we will not.

The COURT. And I trust that we will not have any. But we can not help that. And I do not know that that has any effect on the jury anyhow.

Mr. REILLY. It might have quite an effect.

The COURT. I do not think that is proper.

Mr. REILLY. Out of an abundance of caution anyhow I note the usual exception.

The COURT. Yes.

Whereupon, Mrs. ALICE MCDONALD was called as a witness on behalf of the United States and, having been first duly sworn, was examined and testified as follows: That she was the widow of Harry J. McDonald, and that her husband, during his lifetime, was a police officer; that he was the owner of a Ford sedan automobile, and that he was on duty in the early morning of July 6, 1929, and was attached to the third precinct; that he had the Ford sedan with him at that time and that the witness next saw the automobile about two or three days later, and then said "I don't remember just when, but they brought the car home to me." The witness was then asked

if she examined the car, and she replied "Yes; he told me to." Thereupon counsel for the defendant objected to the statement, and the ruling of the court was as follows: "That she was told to do it is not admissible. That will be striken out." That, as a result of the examination, the witness found the bullet; that she removed the front seat of the car and the bullet dropped out. At that time an envelope containing bullet was marked "Government Exhibit No. 3 for Identification," and the witness was asked to look at the envelope and its contents and tell whether she was able to identify it. The witness thereupon responded "yes." Thereupon the following occurred:

By Mr. SHEA:

Q. Is that the one that you found? Please sit still. (At this point the witness started to cry.)

The COURT. Have you any cross-examination?

Mr. REILLY. No. I will waive it if the Government will stipulate that that two days after the time that it happened was the time that the witness found the bullet.

Mr. SHEA. She will be all right.

The COURT. She will be all right.

23 Mr. REILLY. I make the motion that the court declare a mistrial at this time on the ground of what transpired in the courtroom.

The COURT. Overrule the motion.

Thereupon counsel for the Government asked the witness if she were ready to proceed, and she replied "Yes." That, after finding the bullet she took it to Emergency Hospital and turned it over to Detective Billman; that her husband was present at that time; that the exhibit was in the same condition at the time she was testifying as when she found it. Whereupon the following occurred:

Mr. SHEA. You may examine.

Mr. REILLY. Out of consideration of the witness I have no questions to ask.

The COURT. You may be excused. The witness is finally excused and may go home.

Mr. SHEA. Yes; your honor.

(At this point the witness was excused from the witness stand, and on leaving the courtroom cried and fell and was carried out of the courtroom.)

Mr. REILLY. May the jury be excused for just a few minutes, or would you rather that we approach the bench? I wish to make the same motion that I have heretofore made.

The COURT. Very well; you may approach the bench.

(Thereupon counsel for both sides approached the bench and the following proceedings were had at the bench out of the hearing of the jury):

Mr. REILLY. May it please the court, at this time I wish to make a motion for a mistrial and withdrawal of a juror, on the grounds that the actions and the demeanor of the witness at this time will deny to the defendant a fair and impartial trial. That the witness

produced by the Government proceeded to establish in the minds of the jury that sympathy and that passion and that prejudice that will deny to him his constitutional right of a fair and impartial trial. I think that her actions not only on the stand but as she was leaving the stand and going out absolutely prohibits that fair and impartial trial, and for that reason I make a motion to withdraw a juror and declare a mistrial.

The COURT. Now what does the record show? That the woman fainted when she was asked the question?

Mr. REILLY. That she fainted and she screamed and she hollered at the time that the bullet was shown to her. And at this time also I am going to move—well, I will let your honor rule.

The COURT. I overrule your motion and allow you an exception.

Mr. REILLY. An exception.

Mr. SHEA. I want the record to show that at this time the witness appeared excited.

Mr. REILLY. Excited! She was hysterical.

Mr. SHEA. And gasped, and apparently fainted, and was immediately taken from the courtroom.

Mr. REILLY. And became hysterical when she left the courtroom.

Thereupon counsel for the defendant moved to strike all of the witness's testimony as being absolutely irrelevant and im-
24 material, for the reason that the bullet was found in the automobile two days later; and the court responded that it was a question that will be considered by the jury as to whether it was there at the time, or whether somebody put it there, and, over the objection and exception of the defendant, allowed the testimony to stand.

Whereupon, WILLIAM E. HOLMES was called as a witness for the United States and, being first duly sworn, was examined and testified as follows:

That he was a lieutenant of the Metropolitan police department and assigned to the third precinct; that he had been a member of the department for approximately twenty-seven years; that during the month of July, 1929, he was night commander of the third precinct, and he had under his command one Harry J. McDonald; that McDonald was working in the early morning of July 6, 1929; that he was working from 12 midnight, July 6, until the early morning of the 6th. The witness thereupon stated that he recognized the defendant, Alfred Scott Aldridge, and first saw him about 2 p. m. July 7, 1929, and that he saw him on a street car at Ninth and Penna. Avenue; that, together with Detective Billman, the witness placed the defendant under arrest; that they thereupon placed him in their automobile and drove back to the third police precinct; that while there they had a conversation with him; that Detective Billman was present at the time, and that the witness had the defendant's name placed on the arrest book and immediately took him to the captain's office and asked him whether he was at 17th and Q Streets on the preceding morning; that the defendant replied he was, and said his brother was with him; that the defend-

ant stated he had been there to rob a drug store, and the witness asked him if he went into the drug store; that the defendant said he did, an that his brother waited outside; that the defendant got from the cash register four or five dollars. Thereupon counsel for the defendant stated to the court that the witness was testifying to a separate and distinct crime, and requested the court to instruct the witness to confine his remarks strictly to the pertaining matter. The court thereupon stated as follows:

The COURT. Now he is telling what the defendant said to him. You wouldn't have him tell just part of what the defendant said to him; if he only told part of it you would call for it yourself. He can't be left to determine how much of the conversation the defendant related to him he should tell. I think it is admissible, Mr. Reilly.

That the witness thereupon stated the defendant said he went into the drug store by the side window, got $4 or $5 from the cash register, and then joined his brother; that the defendant saw several white men standing outside, apparently watching; that they went up 17th Street and into an alley; that, after going up there aways, the defendant was arrested by an officer, who told him to get into an automobile, together with his brother, and the officer drove back to 17th and Q Streets; that as the officer started to get out of the automobile the defendant stated that his brother shot the police officer.

Thereupon counsel for the respective parties conferred with the court at the bench, and subsequent thereto the court instructed the witness as follows:

25 The COURT. Lieutenant, for a reason that was made apparent at the bench, you are to discontinue for the time being this conversation you had with him relative to the affairs. That may be taken up later, but this is an entirely different line of inquiry.

The WITNESS. Very well.

The COURT. So through all this conversation or any other conversation you had with him as to what you told him or what somebody else told you, I don't wish you to relate at the present time.

The WITNESS. Very well.

That he then asked the defendant where he went after the shooting, and that he stated he ran through Q Street to 18th Street, went into a vacant house and remained there all day; that in the evening he went back to 502 22nd Street and stayed there for a little while; that he went out and wandered around the streets all night; that the next day he went to the house and stayed a little while, left the house, walked to 18th and Pennsylvania Avenue, where he got on a street car marked "17th and Pennsylvania Avenue, SE.," and rode down the avenue; that the witness thereupon asked the defendant, "Were you coming back any more?" and the defendant replied, "No, I wasn't coming back." Thereupon the witness was asked by the prosecuting attorney whether he had any conversation with the defendant with respect to whether he or his brother had any guns on the night of the shooting. The witness replied that he did, and thereupon counsel for defendant objected to the witness making any statement

as to what the defendant said before it was first shown to the court "whether he held out any inducements or promises to the defendant during the entire evening." That the court thereupon stated that no objection or suggestion was made at the time the witness started to testify, but stated that the witness may proceed, and if it was shown that the statement was not voluntary, or was induced by either promises of immunity or by threats, or anything of the kind, that the court would take appropriate action, but that after going through half a man's testimony was not the time to make an objection. Thereupon the following occurred:

Mr. REILLY. I appreciate that the objection must be made at the time the man starts to testify, but your honor will recall that at the time Lieutenant Holmes stated what was said in the captain's office of the third precinct at that time I objected to it. I said at that time that the witness should be properly qualified before answering.

Mr. SHEA. When did you say that?

The COURT. I don't think the record contains that.

Mr. SHEA. I don't think it will either.

The COURT. But I will give you an exception, and you may proceed.

The witness thereupon proceeded and said that he asked the defendant if he had a gun on the night in question, and that the defendant replied "Yes," that both had guns; that the witness asked the defendant where was the gun that he had, and the defendant replied "Down at the house, 502 22nd Street, upstairs in a closet." That Officer Billman and the defendant were present at the time; that the lieutenant then sent Billman out and that shortly thereafter Billman came back with several guns; that the witness was then asked where he got those guns, and the defendant replied that he and his brother had broken into a store in Georgetown and got several guns. Thereupon counsel for defendant stated that this testimony was subject to the same objection, and the court replied "Yes." The witness thereupon stated that at that time he showed the defendant a black hat and asked him if he recognized it. The defendant replied that he did, and said "I lost my hat on the morning of the shooting on Q Street when I was running along Q Street, between 17th and 18th." Thereupon the witness was shown the hat, which was marked "Government Exhibit No. 2 for Identification," and stated that that was the hat he had just testified about; that this was all of the conversation he had with the defendant with respect to the gun and the hat that the witness could recall; that this entire conversation was had immediately upon the defendant being brought into the station house, and shortly after he was booked. The witness was thereupon asked if he knew what kind of a gun Officer Harry J. McDonald's service gun was, and replied that it was a Colt gun; that it was an automatic revolver. Thereupon the court inquired of the witness whether they were alone at the time this conversation was had with the defendant at the third precinct, and the witness responded that Officer Billman was there,

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and inquired of the witness what was the first thing the witness said to the defendant when he saw him. The witness replied "When I had taken him to the captain's room I asked him if he was at 17th and Q Streets yesterday morning—if he was arrested at 17th and Q Streets yesterday morning. He said he was. I asked him who was with him. He said his brother." Thereupon the court inquired of the witness if that was the introduction to that conversation and the witness replied that it was. The court then inquired whether he warned him in any way, and the witness replied he did not. He thereupon asked him whether he introduced the subject, or whether the officer that was with the lieutenant made the first statement to the defendant. The witness replied that he introduced he subject.

Whereupon, a 3 o'clock p. m. February 26, 1930, the court adjourned until 10 a. m. February 27, 1930, and Lieutenant Holmes resumed the witness stand. That at that time the prosecuting attorney asked the following question:

By Mr. SHEA:

Q. Lieutenant Holmes, I call your attention to when you were testifying yesterday, when you were testifying as to the first conversation you had with the defendant, when you were interrupted, and you told the jury and his honor that this man made a statement at the conclusion of certain details given by him to the effect that his brother shot the officer. You then made a statement that you asked him if he was sure of that, when you were interrupted, do you remember that?

A. Yes, sir.

He was then asked if he remember any further conversation that was had at the time with respect to the shooting. He thereupon stated that he asked the defendant if he was sure of that (that
27 his brother had killed the officer); that the defendant replied he was, and the witness thereupon stated to him "that is most impossible. Your brother was found." Thereupon counsel for the defendant objected to the statement that the witness was about to make, and knew the statement for the reason that it had theretofore been discussed at the bench, and the following occurred: "To any statement that the brother may have made or any response that this witness made have made to the defendant, notes an exception. Whereupon the prosecuting attorney stated "Let the witness make the statement and then move to strike out the part that is objectionable." Whereupon the court said, "He had better make the objection. He knows what the statement is, because he discussed it at the bench." Thereupon counsel for the defendant stated that he objected to the statement the witness was about to make, on the ground (1) that it violated the constitutional privilege which guaranteed to the defendant the right to be confronted with witnesses against him; (2) because it was purely hearsay; (3) that it was a self-serving declaration on the part of the decedent; and (4) that it denied to this defendant the right to cross-examine on ac-

cusatory statements made against him. Thereupon the court overruled the objection, and an exception was allowed. Whereupon the witness continued and said, "Your brother was shot and fell a few feet from the automobile on the sidewalk, and when he fell his gun was lying under him, and had never been exploded; that it was fully loaded." Whereupon the defendant replied, "Well, I am ready to take my medicine." Whereupon counsel for the defendant moved that the answer be stricken, and the court denied the motion, and the counsel for defendant noted an exception and stated to the court that the statement made by the defendant in answer to the lieutenant's question did not bring it within those provisions of the law that had theretofore been discussed and moved to strike it out, to which the court allowed an exception. Thereupon the witness was asked if there was any other conversation had at that time, and he replied that there was not. Whereupon the court instructed the jury as follows:

The COURT. I will say the jury now, and if counsel for the defense desires it I shall say it again when I charge the jury, that any statement made to this officer by anybody other than the defendant is not admissible as evidence against the defendant. In other words, what somebody might say to the witness that would indicate that the defendant had committed an act is not evidence against the defendant. But in relating the conversation this witness had with the defendant, it is proper and appropriate that he should tell all the conversation that he had with the defendant. And the only evidence that can be considered against the defendant or for the defendant is whether or not his statement or his attitude was an assent to what the witness had said to him. In other words, if a person is charged with a crime, and when arrested he is charged with that crime and he denies it, that is evidence for the jury to consider. If he does not deny it, that is evidence to be considered by the jury as to whether or not he assented. And the only purpose for which this statement of
28 the officer is to be considered by you is the attitude and response of the defendant when that statement was made to him by the officer.

Upon cross-examination the witness testified that the first time he saw the defendant was about 2 o'clock Sunday evening, July 7, 1929; that it was at 9th and Pennsylvania Avenue NW., and that Detective Billman of the third precinct was with him at the time; that he was arrested on a street car, and then taken to the third police precinct; that the witness, Detective Billman, and the defendant were in the captain's office at that time; that others were coming in and going out while the examination was going on; that he was unable to state just how many policemen were coming in and going out, but that there were some few officers around the station that came there to look at him, and then passed out again; that later on Detective Waldron came in and that no threats, or anything of the nature, were made against the defendant at that time; that no hope or fear was held out to him; that at the time of the conversation had with this de-

fendant the witness did not inform him that anything he might say would be used against him; that he did not inform him that if he said nothing that it would be used against him; that he did nothing whatsoever to induce or encourage him to make the statement. Whereupon counsel for the defendant informed the court that it was his conception of the law, to which of course the district attorney disagreed, that before any statement could be made by a witness relative to the statements that were made by the accused he must first show that he properly advised the accused of his rights, and that if he did not inform the accused that anything the accused might say would be used against him, the entire statement or confession of the accused would be inadmissible. The court thereupon overruled the objection and an exception was noted.

Thereupon JOHN L. BILLMAN was called as a witness on behalf of the United States and, having been first duly sworn, was examined and testified as follows: That he was a member of the Metropolitan Police Department, and was so during the month of July, 1929; that on July 6, 1929, he was precinct detective of the third precinct; that he had been a police officer for approximately 24 years; that he recognized the defendant, Alfred Scott Aldridge, and that on Sunday, July 7, he saw the defendant on a Capital Traction street car marked "17th and Pennsylvania Avenue," at 9th and Pennsylvania Avenue NW.; that it was about 2 p. m., and that the witness was in the company of Lieutenant Holmes; that the defendant was at that time placed under arrest and taken to the third precinct; that the witness was present at the third precinct when a conversation was had with the defendant, and that Lieutenant Holmes was present at that conversation. The witness was thereupon handed a pistol, which was marked "Government Exhibit No. 7 for Identification," which he was able to identify as a gun he took out of a closet at 502 22nd Street NW. Sunday afternoon, July 7, 1929, at about three o'clock; that he went to 502 22nd Street as a result of a conversation he had with the defendant; that the defendant informed the witness that the gun that he had with him on Saturday morning, July 6, at 17th and Q Streets was in the closet at 502 22nd Street NW.; that as a result of that conversation had between the witness and the
29 defendant the witness went there; that he found the gun in the place the defendant had told him, and that he brought it back to the precinct; that it was shown to the defendant and the defendant said that that was the gun he had. Witness then said that the gun was a Remington automatic. The witness was thereupon shown Government Exhibit No. 2 and stated that he had seen it before; that during the conversation with the defendant the defendant admitted that Government Exhibit No. 2 was his hat that he had dropped on Q Street, between 17th and 18th, while running from 17th and Q Streets. The witness was thereupon shown Government Exhibit No. 5 and asked to examine the envelope and its contents, and after doing so testified that that was the bullet that was given to him in Emergency Hospital by Mrs. McDonald, two or three days after the

shooting; that the bullet was in the same condition at that time as it was when the witness first received it from Mrs. McDonald. Thereupon Government Exhibit No. 2 was admitted in evidence without objection. Thereupon Government Exhibits 4 and 7, which were pistols, were offered in evidence without objection. Upon cross-examination the witness testified that a woman by the name of Price lived at 502 22nd Street NW., but was unable to state whether the defendant lived there or not; that the gun was found in the defendant's brother's room, at 502 22nd Street NW.

Whereupon JOHN H. FOWLER was called as a witness on behalf of the United States, and being first duly sworn was examined and testified as follows: That he was a member of the Metropolitan Police Department, attached to the detective bureau, and had been in the department for approximately 11 years; that he was assigned particularly to the homicide squad; that in connection with his regular work in the homicide squad and the detective bureau the witness had specialized in the identification of firearms, and more particularly small arms, which includes pistols and revolvers; that he was employed in the Remington Arms Company for two years; that he was also attached to the Artillery branch of the Army; that the particular type of side arms used in the Army was a 45 automatic; that during the entire time the witness was a member of the Police Department he carried a gun, which was a small-arm pistol or revolver. He further testified that he had taken special instructions and conferred with other persons considered specialists in that particular line of work; that among them, were Major Hatcher, of the United States Ordnance Department, and the late Sergeant Cornwell, former firearm expert of the Metropolitan Police Department, and also a Doctor Souder who was a scientist at the Bureau of Standards. The witness further testified that he knew Major Calvin Goddard, and that he had conferred with him several times relative to this same subject; that for a period of approximately six years the witness had made a special study of this particular line; that he also had testified in different courts as an expert in connection with firearms; that he was familiar with revolvers and pistols manufactured by the Colt Company, and that he was familiar with other types in addition to the Colt. Whereupon the prosecuting attorney was about to show the witness an exhibit, when counsel for the defendant stated that if the prosecution took the position that the witness was properly
30 qualified to testify as an expert the defense should first be given the privilege to cross-examine the witness, in order to test his qualifications. The court at that time allowed counsel to examine the witness, and counsel for the defendant at that time stated that from the direct examination of the witness, he was not properly qualified, and that cross-examination was a little out of place. The court informed counsel that the witness was properly qualified, and that he stated he had been accepted as an expert in this court a number of times. Counsel thereupon stated that the witness did not state

any particular number of times, and the court responded that if he was only admitted once, that, if this was the first time, he thought the witness was properly qualified. Whereupon counsel for the defendant proceeded to examine the witness relative to his qualifications, and it was disclosed that the witness worked for the Remington Arms people and at first he worked in the part where the barrel was bored and rifled; that later he worked in the filing division, and later as an inspector; that he was employed by the Remington Arms Company for approximately two years; that to the best of his recollection it was in 1915 or 1916; that he was in no other department of the factory except those which he had testified to; that he was in the barrel and filing department and was an inspector of parts of firearms, and by that he meant the mechanism; that he was in the Army for approximately two years and five days from June 1, 1917, until June 6, 1919; that he was attached to the Artillery, and later to the machine-gun battalion of the Artillery; that in that particular branch they had the three-inch field gun on this side, and on the other side they had the French 75 and also the 45 automatic as side arms; that upon being asked what particular qualifications he acquired in the Army, say more than any other soldier, that may have qualified the witness as an expert, he replied "Only the handling of firearms." Upon being asked if all soldiers did not handle firearms, he replied "Not in all branches." Upon being questioned whether any soldier that had been in the United States Army would not know something about firearms, the witness replied "No, sir," and upon being questioned as to instructions that he received from Major Hatcher the witness stated that Major Hatcher was the ballistic expert of the United States Army Ordnance Department attached in the War Department, Washington, D. C.; that he is the author of a book on small arms, revolvers, and pistols; that the book was a complete book of some 380 pages; that the witness had read the book several times, but that it was not under the supervision of anyone; that he never took an examination on the ballastic book, and upon being asked for the name of any other famous author on ballistics the witness replied that there is a book on small arms and ballistics written by a man named McKee, whose first name he did not know; that upon being questioned where was this book published the court informed counsel that that was immaterial, and counsel for the defendant at that time stated that he did not think it was immaterial, because of the witness' qualifications, and the court inquired of counsel for the defendant if he was not satisfied that the witness was qualified, and counsel replied that he was not. Whereupon the witness said he could not give the date of its publication, and upon being questioned as to what particular instructions he received from Sergeant Cornwell the witness replied "Identification of bullets and firearms." The witness was
31 thereupon asked what were the principal parts of an automatic pistol, and the court interrupted to ask "What is the question?" The prosecutor at that time objected to the question, in view of the fact that it was beyond the scope of the qualification.

The court, however, allowed the question, and the witness was again asked what were the principal parts of a pistol. The witness thereupon answered "Well, you might determine one part, and I might determine one part." He then stated that the trigger is one principal part, the hammer is another principal part, the firing pin another. Whereupon counsel for the defendant inquired of the witness as to what the Ordnance Department specified as the principal part. The witness thereupo replied "I have never seen that." He was then asked "Don't you know that the Ordnance Department says it is the receiver, the barrel, and the slide?" Whereupon the following took place:

A. I am sorry, but I didn't hear you.

Q. The principal parts of a pistol are the receiver, the barrel, and the slide?

Mr. SHEA. Now, just a minute. I object to that. That is not the same question that was asked him.

Mr. REILLY. I asked him what were the principal parts of a pistol.

Mr. SHEA. Of an automatic pistol. Now you are talking about an ordnance pistol.

Mr. REILLY. An automatic pistol I am referring to now.

Mr. SHEA. That is not your last question.

By Mr. REILLY:

Q. What are the three principal parts of an automatic pistol?

Mr. SHEA. That is your first question, and he told you what he thought they were, and then you cross-examined on something else, and you did not ask as to the same weapon.

Witness was then asked the weight of a 38 automatic Colt, to which he replied he did not know. He was unable to state the pressure in pounds that it requires to discharge the pistol. He did not know the total length in inches of a 38 automatic Colt. He did not know the length of the barrel. He stated that the diameter of the bore would be .38 of an inch; on a 45 automatic it would be 45 hundredths of an inch; that there were seven grooves and seven lands in the Remington; that there were six grooves and six lands in a Colt automatic; that he was unable to state what was the ratio of a groove to a land in a Colt gun; that he was unable to state, offhand, the width of the groove in a 38 Colt automatic. He was likewise unable to state the width of a groove in a 38 Remington automatic. The witness was unable to state the depth of a land of a 38 Colt or a 38 Remington automatic. The witness was unable to state the rapidity of fire of a Colt automatic 38. He was unable to state the velocity with which a bullet leaves a gun, either of a 38-caliber Remington or 38-caliber Colt. He was thereupon asked what was the depth of penetration at a range of 25 yards, using white pine as a substance; and, upon objection by the prosecution, the court informed counsel that he had pursued the course far enough, and counsel thereupon requested the court whether he thought the witness was qualified as an expert, to which the court re-

plied, "Yes, absolutely," and to which counsel replied, "Very well. I withdraw my further examination, and note an exception."

Whereupon the prosecuting attorney continued his direct examination and presented to the witness Government Exhibit No. 4, and requested him to advise what it was. He replied that it is known as a Colt automatic pistol and that he had seen it before, and the first time was on July 6, 1929, at about six a. m., at Emergency Hospital, and that at that time it was in the possession of Detective Sergeant King and Trammell; that Trammell was a member of the detective bureau, and that the exhibit was turned over to the witness at that time; that he then made an examination of it, which disclosed it to be fully loaded, seven cartridges in the magazine and one in the chamber; that at that time it was completely loaded and could not possibly have held another cartridge; that the maximum capacity of a gun was one cartridge in the chamber and seven in the magazine. The witness was thereupon asked if he was familiar with any characteristics that would be shown from a bullet fired from the gun, and he replied that he was, and that such characteristics would be the grooves and lands which the bullet would receive as it would pass through the barrel, and that this particular gun, which was a Colt, had six grooves and six lands, the grooves turning to the left; that all Colt guns had the same characteristics; that no other gun of American make has such; that a Remington does not have it. He was thereupon asked if he had fired a bullet from the gun, to which he replied that he had, and that he had it with him and produced it; that the grooves and lands produced a mark or impression on the bullet; that the bullet at that time produced by the witness was fired through the Colt gun by the witness himself as a test bullet; that the test bullet at that time was marked "Government Exhibit No. 8."

The witness was thereupon handed Government Exhibit No. 7, and testified that he had seen it before and that it was a Remington automatic pistol, .38 caliber; that it had special characteristics as compared with Government Exhibit No. 4, which was a Colt; that the particular characteristics of the Remington automatic pistol were seven grooves and seven lands in the barrel, with a right-hand twist; that, in other words, a Colt had six grooves and six lands and a Remington had seven; that the grooves in a Colt go to the left and the grooves in the Remington to the right; that a bullet fired from Government Exhibit No. 7, the Remington, would have peculiar characteristic marks by which it might be identified, and that such characteristic marks would be seven grooves and seven lands turning to the right on the bullet.

The witness was thereupon shown Government Exhibit No. 5, and testified that he had seen it before; that upon the bullet were seven grooves and seven lands that it received while passing through the barrel, and that a bullet fired from Government Exhibit No. 7 would have such characteristics; that such characteristics would be impossible if the bullet were fired through a Colt gun. The witness

thereupon testified that no other type of gun known to him, except the Remington, would have seven grooves to the right. He then testified that he had seen and examined many types of guns
33 with respect to the rifling and its characteristics; that the Remington was the only one with which he was familiar that had seven grooves and lands twisting to the right. The witness was then asked if in his opinion Government Exhibit No. 5, which was a bullet, was fired from Government Exhibit No. 7, which was the Remington automatic pistol, the witness replied "I know positively that it was," and over the objection and exception of the defendant Government Exhibit No. 5, the bullet, was introduced in evidence.

Upon cross-examination the witness testified that a Remington had seven grooves to the right; that all Remington .38-calibre automatic pistols had such characteristics. The witness was then asked if all bullets that may have come out of any .38 automatic Remington would be designated and impressed the same as that bullet (Government Exhibit No. 5) was, to which he replied "No." The witness was then asked if he had fired any bullets from the Remington gun, and replied that he had, but that he did not have them with him; that they were fired from the gun on July 20, 1929, or July 21, 1929, at the Bureau of Standards, and that Sergeant Cornwell and Dr. Souder were present at the time.

Whereupon, at the close of the cross-examination by counsel for the defendant it was again moved to exclude the testimony of the witness on the ground that the bullet had not properly been connected up in order to admit it in evidence, and the motion was overruled and an exception noted.

Whereupon, Government Exhibit No. 5, the bullet, found some two or three days after the homicide, was shown to the jury.

Whereupon the court asked the witness if the lands or grooves about which he had spoken as being impressed upon the bullets or cartridges had such lands and grooves upon them before the gun was fired. The witness replied that they did not, and the witness further informed the court that the evidences of the grooves and projections that were on the side of the bullet was that from which he drew his conclusions, and that such grooves and lands corresponded with those in the gun; that a land is located between two grooves in the barrel of the pistol, the land being the higher part and the groove being the part that is cut into the barrel; that the land is the elevation and the groove is the depression. The court was then informed that if the barrel were perfectly smooth there would be no impression on the bullet.

Thereupon the Government rested its case in chief, and at this time counsel for the defendant moved to withdraw from the consideration of the jury the question of first-degree murder for the reason that there was no evidence of first-degree murder presented to the jury; that the deliberate intent to take life, which was an essential element of murder in the first degree, had not been shown as a fact. The motion was overruled and an exception noted.

Whereupon ALFRED SCOTT ALDRIDGE, the defendant herein, took the stand as a witness in his own behalf, and, having been first duly sworn, testified as follows:

That on July 6, 1929, he saw an officer on Corcoran Street between 17th and 18th Streets; that he, together with his brother, heard an automobile approaching; that his brother turned around and said,
"Here comes a cop; here comes a cop"; that his brother then
34 touched him on the arm and said, "Listen, Al, I am not going to be taken alive; I would rather die before I go back to prison again."

The witness then stated that of his own personal knowledge he knew that his brother was a fugitive from the Massachusetts State Reformatory and other prisons; that both he and his brother got into the automobile on Corcoran Street; his brother got in first and he immediately thereafter; that the witness had a gun in his waist, on the left side, and that he did not want to be found with a gun on his person; that he attempted to duck it behind him, but there wasn't sufficient room in the auto for him to do so; that he placed it beside him on his left, and that his brother continually nudged him during the journey; that when they arrived at 17th & Q Streets his brother jumped up and shot the officer, that at that time the witness got excited and jumped in order to get out of the car; that his brother came out right after him and fell over the defendant; that at that time the gun fell out of the brother's hand and on the sidewalk; that in getting up the defendant picked the gun up and ran up Q Street.

Upon cross-examination the witness testified that the officer placed him under arrest on Corcoran Street; that both got into the automobile and that he was the last to enter; that both he and his brother had a gun; that the witness lived at 2137 L Street, and that when arrested the witness was going towards 18th on Corcoran Street; that immediately upon getting into the automobile the witness took his gun from his waist; that he did not have a vest on and that he had his gun right in his belt before that; that with his left hand he took his gun and attempted to tuck it behind him; that he put it on the seat between himself and his brother; that the automobile they were in was a Ford car and that all three of the occupants were in the front seat; that they then rode back to 17th & Q Streets, and that when the automobile stopped he heard his brother fire a shot. He was then asked if he saw his brother shoot the officer and he replied he could not see, "He had his back to me"; that he used his right hand; that the officer was shot just as the automobile was about to come to a stop; that the defendant immediately got out, or started to get out, and fell; that his brother then ran over him, and the defendant stated that at that time he was a little dazed; he then picked it up and ran. The witness was thereupon shown a gun and asked if that was the gun that he had on that Sunday night. He replied that it looked something like it; that he had only seen it twice, and that he did not know if it was the gun or not. The wit-

ness was then asked what he did with the gun after he left the scene and whether he took it away from the scene with him, and upon objection and exception on the part of the defendant on the grounds that he was not within the scope of the direct examination, the witness testified "I took it away and put it back in my brother's room." The witness was then asked whether after he was arrested he told the officers where he had taken the gun on the night in question, and over objection and exception of counsel for the defendant, because it was not within the scope of the direct examination, the witness testified that he told the officers he picked the gun up off the sidewalk and told them that they would find the fingerprints
35 of his brother on it. Upon being asked if he had not handled it since his brother had the gun, the witness answered that he put it in a bag and took it home that night; that he picked it up with his hands from the street, carried it about a block, and then put it in a paper bag. The witness was then asked if he was not the same person who, under the name of Charles Johnson, alias Alfred Aldridge, was convicted in Massachusetts of housebreaking and entering on March 23, 1921. Counsel for the defendant at that time objected to the question, and first asked the defendant his age. He replied "Twenty-two." Counsel for the defendant then informed the court that 1921 would be nine years ago; that the introduction in evidence at this time of any offense committed by the defendant nine years ago would bring such offense within juvenile offenses, and because of pertinent legislation in such case made and provided the introduction in evidence of the record of the defendant herein would be unlawful, and over the objection and exception of the defendant the defendant answered that he was the same person who was so convicted of breaking and entering on March 23, 1921. Whereupon the defendant rested its case and the Government offered no rebuttal.

The defendant at this time again made a motion to withdraw from the consideration of the jury the question of first-degree murder for the same reasons that were given at the time the Government closed its case, which motion the court again overruled and allowed an exception.

Whereupon, the following prayers were offered, and action as noted on the prayers, was taken by the court.

DEFENDANT'S PRAYERS

Defendant's prayer No. 1

You are instructed as matter of law that the defendant at the outset of this trial is presumed to be innocent. He is not required to prove himself innocent or to put in any evidence at all on that subject.

In considering the testimony you must consider and view it in the light of this presumption with which the law clothes the defendant,

that he is innocent, and it is a presumption that abides with him throughout the trial of the case until the evidence convinces each individual juror of his guilt beyond all reasonable doubt.

Granted.

Defendant's prayer No. 2

You are instructed that a reasonable doubt is that state of the mind which, after the entire comparison and consideration of all the evidence, leaves your minds in that condition that you can not say you feel an abiding conviction of the truth of the charges.

The burden of proof is always upon the Government, and if, upon the proof, there is reasonable doubt remaining the defendant is entitled to the probability that the fact charged is more likely to be true than the contrary, but the evidence must establish the truth of the charge to a certainty that convinces the understanding and satisfies the reason and judgment of each individual juror beyond any reasonable doubt.

Denied. Exception.

Defendant's prayer No. 3

You are instructed that a strong probability of defendant's guilt is not sufficient to warrant his conviction, and before you would be justified in finding the defendant guilty you must find that there is no reasonable hypothesis consistent with his innocence; although it might appear that the probability of his guilt is greater than the probability of his innocence, you would not be justified in finding defendant guilty unless his guilt is established beyond all reasonable doubt.

Granted.

Defendant's prayer No. 4

The court instructs the jury that if, upon the whole evidence in the case, there is any reasonable hypothesis or theory consistent with the innocence of the accused, they must find him not guilty.

Granted.

Defendant's prayer No. 5

The court instructs the jury that probability of the defendant's innocence is a just foundation for a reasonable doubt of his guilt, and, therefore, if the jury find that there is a probability of the defendant's innocence, they should find him not guilty.

Denied. Exception.

Defendant's prayer No. 6

The rule regarding the question of proof in a criminal case differs from that in a civil case. In a civil case in order to find a verdict the jury have to but find on which side of the case the evidence pre-

ponderates; but in a criminal case each juror, before a verdict can be returned, must find the defendant guilty of all the elements of the offense beyond a reasonable doubt.

Denied. Exception.

Defendant's prayer No. 7

The District of Columbia law describes the crime of murder in the first degree as follows: "Whoever, being of sound memory and discretion, purposely, and of deliberate and premeditated malice * * * kills another, is guilty of murder in the first degree." The burden of proving each essential element of the offense is placed upon the prosecution, and until each essential element is established to your satisfaction beyond any reasonable doubt you can not return a verdict of guilty as indicted.

You are instructed as a matter of law that before you would be justified in returning a verdict of guilty of murder in the first degree you must find that the defendant had formed prior to the killing, with deliberation and premeditation, a purpose to kill the deceased. By premeditation is meant the thinking over, deliberating upon, weighing in the mind beforehand, the deliberate intention to kill.

Granted.

37 *Defendant's prayer No. 8*

You are instructed as a matter of law that the law of the District of Columbia describes murder in the second degree as follows: "Whoever with malice aforethought, kills another is guilty of murder in the second degree." If you find after your deliberation that the killing, no matter how malicious, was not the result of premeditation, as has been described, your verdict should be guilty of murder in the second degree.

Granted.

Defendant's prayer No. 9

You are instructed as matter of law that you can not return a verdict of first-degree murder unless you are convinced beyond a reasonable doubt that the defendant shot the deceased with deliberate and premeditated malice and at the time he shot he was of sound memory and discretion.

Withdrawn.

Defendant's prayer No. 10

In the event that you determine that the defendant fired the shot that caused the death of the decedent, the court instructs you as a matter of law that you can not return a verdict of first-degree murder if the evidence is so evenly balanced as to cause you to entertain a reasonable doubt as to whether the defendant shot with deliberation and premeditation or if he shot with malice aforethought. If there

is such a doubt in your minds, you must resolve your doubt in favor of the defendant and would be prohibited from returning a verdict of first-degree murder.

Denied. Exception.

Defendant's prayer No. 11

You are instructed as a matter of law that malice is a wicked intention of the mind. It is an act done with a depraved mind, and attendant with circumstances which indicate a wilful disregard of right or the safety of others.

Malice aforethought is such a wicked intention of the mind previously entertained.

If, after your deliberation, you find that the defendant acted with malice aforethought but without deliberation and premeditation, bearing in mind malice as herein defined, then you would be prohibited from returning a verdict of murder in the first degree.

Granted.

Thereupon arguments were made on behalf of the Government and the defendant by the respective counsel.

Charge to jury

Thereupon the court charged the jury as follows:

The court (Mr. Justice GORDON). Gentlemen of the jury, the defendant, Alfred Scott Aldridge, is indicted for the murder of one Harry J. McDonald in that on the 6th day of July, in the year 1929, in this District, he shot the said McDonald with a pistol, and as a result of that shot or shooting McDonald died on the 22nd day of July, 1929.

38 The indictment charges that this was done purposely and of deliberate and premeditated malice, thus defining what our code has defined as murder in the first degree.

It is the duty of jurors in criminal cases to take the law from the court and to apply that law to the facts as they find them to be from the evidence. Upon the court rests the responsibility of declaring the law and upon the jury the responsibility of applying the law so declared to the facts as they in their conscience believe them to be.

Counsel for the defendant has read certain prayers or instructions which the court has granted, and so far as they go they are the law of this case.

The purpose and object of an indictment in criminal cases, gentlemen, is to inform the defendant of the nature and character of the accusations against him. It does not amount to evidence against the defendant in any degree whatever. The only purpose for which it may be considered by you is to determine the crime of which the defendant is accused.

There are two degrees of murder in this jurisdiction: Murder in the first degree and murder in the second degree. The code, as I stated a moment ago, defines murder in the first degree thus:

"Whoever, being of sound memory and discretion, purposely, and of deliberate and premeditated malice, kills another, is guilty of murder in the first degree."

The code defines murder in the second degree as the unlawful killing of one person by another with malice aforethought.

You will observe that in defining murder in the first and second degree the word "malice" is used. In its ordinary use in everyday life the word "malice" would indicate a feeling of hatred or ill will towards another, or, as otherwise expressed, a feeling of malevolence by one person against another. In its legal sense, however, it has a broader significance. It is there not required to establish any special or particular ill will, hatred, or grudge on the part of the person accused towards the deceased. It means that condition of a person's mind which prompts him wilfully to do something against another to the injury of that other or the intentional doing of a wrongful act towards another without justification or excuse.

The code provides that in murder in the first degree the malice must be deliberate and premeditated. That means that the defendant who is charged with the crime must have deliberated and premeditated before he carried into execution the intention to kill, if such intention he had. The law says that there must be some period of time during which the deliberation or premeditation must have taken place. It is said that there must be an appreciable time during which the mind of the person accused does deliberate or premeditate as to whether or not he will execute the purpose of the killing. And inasmuch as the law does not and could not fix any exact period or limit of time, it becomes and is a fact for the jury to determine whether in a particular case there has elapsed between the formation of the intention to kill and its execution an appreciable interval of time during which the mind deliberated and premeditated and then carried into execution the act of killing.

39 In connection with the same matter you should also bear in mind that every man is presumed to intend the natural and probable consequences of his own act. Thus it is known to mankind from common experience that a loaded pistol under certain circumstances and conditions is both a dangerous and deadly weapon, and that when it is deliberately discharged at or against the person of another it is liable, and indeed it is likely, to kill such other person.

In this case, as in all criminal cases, the defendant is presumed to be innocent, and that presumption should abide in your minds in such a way as to cause you to find the defendant not guilty unless upon all the evidence you are convinced that he did the acts which he is charged with doing in the indictment and is guilty beyond a reasonable doubt.

The burden of proof is upon the Government to establish every essential element of the crime charged against the defendant beyond a reasonable doubt. A reasonable doubt means such a doubt as would leave your minds, after a candid and impartial investigation of all the evidence, so undecided that you are unable to say that you

have an abiding conviction of the defendant's guilt, or such a doubt as in the graver and more important transactions of life would cause a reasonable, prudent person to hesitate and pause.

Furthermore, the words "reasonable doubt" must be given their usual and ordinary meaning. The doubt must not be trivial or whimsical or based upon groundless conjecture, but must be one that arises out of the evidence or from the lack of evidence and one which to you appears to be reasonable.

The evidence in this case is in large measure circumstantial. You are the sole judges of the facts and the evidence. As I remember it, there is no evidence that anybody saw the defendant shoot the deceased. The defendant says that he did not do the shooting. Circumstantial evidence is that which relates to a series of other facts then the facts in issue which by experience have been found so associated with the facts that in relation to cause and effect they lead to a satisfactory conclusion. For example, when footprints are discovered after a recent snow it is proper to infer that some animate being passed over the snow since it fell, and from the form and number of footprints it can be determined whether they were those of a man, a bird, or a quadruped. Such evidence, therefore, is founded upon experience and observed facts and instances establishing the connection between known or proved facts and the facts sought to be proved.

Again, circumstantial evidence is composed of facts which raise a logical inference as to the existence of the facts at issue. A conviction may well be had upon such circumstantial evidence. But to warrant a conviction upon evidence of that character the proven facts must not only be consistent with the hypothesis of guilt, but must do that satisfactorily and must exclude every other reasonable hypothesis save that of guilt.

As I said before, you are the sole judges of the facts in this case, and also the sole judges of the credibility of the witnesses and of the weight of the evidence given by them. With respect to the credibility of witnesses, if you believe that any witness has knowingly and wilfully testified falsely to any matter or fact material to the issue on trial you may reject all or any part of such testimony.

Where a witness has a direct personal interest in the result of a case, the temptation is strong to color, pervert, and to withhold the truth. The deep personal interest which a person may have in the result of the case should be considered by you in weighing his evidence and in determining how far and to what extent it is worthy of credit.

The first fact that you are to determine is whether or not the defendant shot the deceased, and then to determine whether that shot caused the death of the deceased. Then if you determine those facts in the affirmative you should determine whether or not this defendant purposely and of deliberate and premeditated malice killed the

deceased. You are to consider in that connection all the evidence that has been introduced before you.

In respect to deliberation and premeditation, as I have instructed you, the law does not fix any particular or exact period, but sufficient time for a man to make up his mind that he is going to do the act or thing, and then does it.

If you find that there was no deliberation or premeditation on the part of the defendant, then you are to consider whether or not, if he shot the deceased, that shot was fired with malice aforethought.

There has been evidence introduced here of a statement made by the defendant to one or more police officers while at one of the police precincts. Such statements under certain conditions may be considered as a confession or a declaration or statement against interest. You will remember the statement he made when certain statements were related to his relative to a statement by his brother. I will say to you that any statement made by the defendant's brother as to whether he, the brother, did or did not do the killing, or whether the defendant did or did not do the killing, is not to be considered by you as evidence against the defendant in determining whether or not the defendant did the shooting. It is to be considered by you only in considering his response to that statement, and, remembering the response that the defendant made, if you consider that that amounts to an assent to that, that is to be considered by you.

As I say, I will not attempt to quote the statement. Whatever the statement made was, before it can be considered by you, his response, I mean, you are to determine whether or not that statement was made freely and voluntarily.

A confession or statement made by the defendant, if freely and voluntarily made, is evidence of the most satisfactory character. The rule is that in order to render a statement admissible the proof must be sufficient to establish that the making of the statement was voluntary—that is to say, that from the causes which the law treats as legally sufficient to engender into the mind of the accused hope or fear with respect to the crime charged the accused was not involuntarily compelled to make the statement when but for the improper influence he would have remained silent. The confession must be free and voluntary, but is not produced by inducement engendering either hope or fear. It is the duty of the jury to reject the confession altogether if they should have a reasonable doubt as to its voluntary nature.

There is some evidence here that after the defendant was arrested and after the shot was fired the defendant ran away. In law that is called "flight." You are instructed that the flight of a person accused of a crime is a circumstance to be considered by you in connection with all the other elements of the case in determining whether he is guilty and given such weight as you may consider it entitled to.

There is but one of three verdicts that you may find in this case, and, as I have told you before your verdict, whatever it may be, must be unanimous.

If you believe that the defendant purposely and with deliberate and premeditated malice shot and killed the deceased, McDonald, and you believe that beyond a reasonable doubt, bearing in mind the safeguards thrown around the defendant by the law, it is your duty to find him guilty as indicted.

If you believe, bearing in mind, as I have said, the safeguards that are thrown around the defendant by the law, that he killed the deceased with malice aforethought, and you believe that beyond a reasonable doubt, it is your duty to return a verdict of murder in the second degree.

If you do not believe he is guilty beyond a reasonable doubt of either murder in the first or second degree, it is your duty to return a verdict of not guilty.

There is some evidence here that the defendant had been in trouble before, and, I think, had served a term in prison. That is to be considered in this case, not as to whether he is guilty or not, but considered only in determining what weight you should give the testimony of the person who has had such an experience.

As I said to you before, you can find a verdict of guilty as indicted, or guilty of murder in the second degree, or not guilty.

You may now retire.

Whereupon the following occurred:

Mr. REILLY. May counsel and I approach the bench before the jury goes out?

The COURT. Yes.

(Thereupon counsel on both sides approached the bench and the following proceedings were had at the bench out of the hearing of the jury:)

Mr. REILLY. Your honor recalls there is an indictment returned in this case by the July grand jury and another one by the October grand Jury. Under section 1033 of the Revised Statutes the defendant is entitled to two days' notice two days prior to trial, to be served with a copy of the indictment. I noticed that the indictment that had been served on him in this case is the indictment that was returned by the July grand jury. Now, of course, in going to the jury, I take it that the July grand jury indictment will go to the jury?

The COURT. Of course, whatever the indictment is that he was tried on will go. I do not know which one he is tried on.

Mr. REILLY. But there are two separate indictments, as you know.

42 The COURT. Whichever one they are trying him on goes to the jury. I do not know which one they are trying him on.

Mr. REILLY. The one that was served on us in Criminal No. 48537. What indictment are you trying?

Mr. SHEA. Here is the copy of the indictment filed, 48789.

The COURT. Why did you not raise that objection when you went to trial?

Mr. SHEA. I am giving you the right one.

The COURT. Give him the indictment on which he is being tried.

Mr. REILLY. Under the law, as I understood it, I thought this was the indictment that should go to the jury, the one that was served on him.

Mr. SHEA. That is the right one.

Mr. REILLY. The one that is going to the jury, 48789?

Mr. SHEA. Yes.

Mr. REILLY. The one that was served on this defendant was 48537.

Mr. SHEA. That is not what this record shows.

(Thereupon counsel for both sides retired from the bench and the following proceedings were had in the hearing of the jury:)

The COURT. The jury may retire.

The foregoing is the substance of all of the testimony bearing upon the exceptions herein reserved on behalf of the defendant.

Thereupon, as all of said exceptions were duly entered upon the minutes of the court, before the jury retired to consider of its verdict, and because the matters of record, in order to make the same a part of the record herein, which is hereby ordered, so that the defendant may have his case reviewed on appeal, the defendant, by his attorney, moves the court to sign and seal this, his bill of exceptions, to have the same force and effect as if each and every one of said exceptions had been separately signed and sealed which motion is granted by the court; and thereupon the defendant tenders this, his bill of exceptions, and requests the court to sign and seal the same, which is accordingly done, nunc pro tunc, this second day of June, 1930.

PEYTON GORDON, *Justice.*

No objections.

WALTER M. SHEA,
Assistant U. S. Attorney.

JAMES F. REILLY,
Attorney for Defendant, Investment Building.

[File indorsement omitted.]

43 [Minute entry of argument and submission, Dec. 2, 1930, omitted in printing.]

44 in Court of Appeals of the District of Columbia

ALFRED SCOTT ALDRIDGE, APPELLANT v. UNITED STATES OF AMERICA	No. 5255

Before MARTIN, *Chief Justice* and Robb and Van Orsdel, *Associate Justices.*

Opinion filed Jan. 6, 1931

Mr. Justice VAN ORSDEL delivered the opinion of the court:

This appeal is from a judgment of the Supreme Court of the District of Columbia on a verdict convicting appellant defendant below of the crime of murder in the first degree.

It appears that early in the morning of July 6, 1929, the defendant and his brother were observed burglarizing a drug store at the northeast corner of 17th and Q Streets, northwest, in the city of Washington. The police were notified and Officer McDonald, among others, responded. This officer stopped for a few moments at the drug store and then drove his car north on 17th Street, where he apprehended defendant and his brother, arrested them, ordered them into his car, and drove back to the drug store. As they reached the drug store and the car stopped, a shot was heard inside of the car. Defendant opened the right front door of the car, jumped out of the machine and ran west on Q Street, holding a revolver in his hand. The brother alighted from the car and proceeded to run north on 17th Street. McDonald, though wounded, got out of the car, fired a shot at defendant and then shot at the brother. The brother was hit and subsequently died from his wound; defendant escaping uninjured. McDonald subsequently died from the affects of his wound.

It appears from the testimony that the officer and the two men were in the front seat of the automobile, McDonald at the left side, driving the car, defendant's brother in the center, and defend-
45 ant at the right. The officer was wounded in the right side of the chest, the bullet penetrating his body, came out through the back. Defendant's brother when found where the officer had shot him, had a loaded revolver in his possession which had not been discharged.

Two days later, defendant was arrested, and when taken to the police station, admitted his identity, but insisted that his brother had fired the shot that killed McDonald. He told the officers where his revolver could be found. It was found at the place designated, taken to the police station and defendant admitted that it was the revolver that he had in his possession the night that he was arrested. It contained two empty shells. Experts testified that the bullet that passed through McDonald's body and was subsequently found on the seat of the automobile, had been fired from defendant's revolver. When defendant was confronted with the statement that it was impossible that his brother could have fired the shot, since there was no empty shell found in his revolver when he was killed, replied: "Well, I am ready to take my medicine."

There was considerable other corroborating evidence which it is unnecessary to consider, since it is not contended that the evidence was insufficient to support a verdict finding defendant guilty of some degree of homicide.

Counsel for defendant assigns as error the refusal of the court to allow him to inquire of the prospective jurors on their voir dire whether they entertained racial prejudice in a case where in the defendant is a negro and the deceased a white man. We had occasion to consider this same question in the case of Crawford vs. United States, 59 — App. D. C. —. We have given the matter further careful consideraion in this case and find no reason to recede from our former decision. In a jurisdiction like the District of Colum-

bia, where the colored race is accorded all the privileges and rights
under the law, that are afforded the white race, and especially
46 the right to practice in the courts, serve on the jury, etc.,
we are of the opinion that there was no abuse of discretion on the part of the trial court in refusing to permit the question to be answered by the jurors.

It is urged by counsel for defendant that the court erred in refusing to withdraw from the consideration of the jury the question of defendant's guilt of first degree murder, on the theory that there was no evidence of premeditation or deliberation. Deliberation and premeditation may be instantaneous. Their existence is to be determined from the facts and circumstances in each case. It is a question, under a proper charge by the court, for the jury to determine. The circumstances under which the present crime was committed all tend to establish the commission of the offense with deliberation and premeditation. Defendant, still armed, was under arrest and had ridden with the officer to the point where the crime for which he was arrested had been committed. While the officer was in the act of stopping his car and engaged with the mechanism of the vehicle, defendant reached past his brother and fired the fatal shot. These circumstances are amply sufficient to justify the conclusion of the jury that the act was done with deliberation and premeditation.

Error is assigned on the refusal of the court to declare a mistrial when the widow of the deceased fainted on the witness stand and became hysterical. She was the witness from whom the Government could prove the finding of the bullet. She had found the bullet on the seat of the automobile after her husband had been shot, and the scene on the witness stand occurred when she was shown the bullet for identification. Scenes of this kind frequently occur in the court room in the course of criminal trials, and if a circumstance of this sort should result in a mistrial, the administration of justice could be greatly impeded.

47 Error is assigned in the refusal of the court to grant a prayer on behalf of defendant to the effect that if the jury should find that defendant fired the fatal shot they would not be justified in returning a verdict of first degree murder, if the evidence was so evenly balanced, as to cause them to entertain a reasonable doubt as to whether defendant shot with deliberation and premeditation. While this prayer was denied, the court, in its general charge, defined the degrees of murder, and also gave very full instructions on the question of reasonable doubt and the presumption of innocence. Where a proper prayer is denied, the error will be cured by covering the matter requested in the court's general charge.

It appears that defendant was indicted at the July term of the court, 1929, under indictment No. 48537. On November 12, 1929, a plea in abatement was interposed and before any action was taken on this plea, the case was again presented to the grand jury, which returned an indictment charging defendant with murder in the first

degree. This indictment was No. 48789. To this indictment defendant pleaded not guilty and it was on this indictment that he was tried and convicted.

Two days prior to the trial, defendant was served with a copy of indictment No. 48587. Without raising any question as to his having been served with the first indictment, he was tried on the second indictment, and reserved his objection to the lack of proper service until the close of the trial. Section 1033 of the Revised Statutes provides: "When a person is indicted of treason, a copy of the indictment and a list of the jury, and of the witnesses to be produced on the trial for proving the indictment, stating the place of abode of each juror and witness, shall be delivered to him at least three entire days before he is tried for the same. When any person is indicted of any other capital offense, such copy of the indictment and list of jurors and witnesses shall be delivered to him at least two entire days before the trial."

48 This provision of the statute is not directory, but it is mandatory on the Government to furnish the indictment and the lists therein provided. The statute, however, being enacted for the benefit of the accused may be waived unless objection is seasonably made. In the case of Logan vs. United States, 144 U. S. 263, 304, the court interpreting the provisions of section 1033, said: "The provision is not directory only, but mandatory to the Government; and its purpose is to inform the defendant of the testimony which he will have to meet, and enable him to prepare his defense. Being enacted for his benefit he may doubtless waive it, if he pleases; but he has a right to insist upon it, and if he seasonably does so, the trial can not lawfully proceed until the requirement has been complied with."

It is generally held that if the accused fails to make objection until the trial has started and witnesses have been examined, that he will be deemed to have waived the privilege. Regina vs. Frost, 9 Car. & P. 129, 175, 187; Lord vs. State, 18 N. H. 173, 175. In other words, the duty rests upon him of presenting his objection before the jury is empanneled, or at least when the first witness is called by the prosecution for examinaton. If the objection is properly made it would then operate to delay the trial until such time as proper service could be made. A defendant, however, will not be permitted to allow the trial to proceed with the examination of witnesses and then successfully interpose his objection. For the reasons stated, we think, in this case, the objection was not seasonably made and the defendant will be held to have waived any benefit which he might have had from the service of the proper indictment.

It may be suggested, however, that the only difference between the two indictments consisted in their number and date. The averments in each indictment were the same. What effect this would have had in the decision of the case had timely objection been made by the defendant, it is unnecessary for us to consider.

49 The judgment is affirmed.

[File endorsement omitted.]

50 In Court of Appeals of District of Columbia

* * * * * * *

ALFRED SCOTT ALDRIDGE, APPELLANT,
vs.
UNITED STATES OF AMERICA
No. 5255, January term, 1931

Judgment January 6, 1931

Appeal from the Supreme Court of the District of Columbia. This cause came on to be heard on the transcript of the record from the Supreme Court of the District of Columbia and was argued by counsel. On consideration whereof, It is now here ordered and adjudged by this court that the judgment of the said Supreme Court in this cause be and the same is hereby affirmed.

per MR. JUSTICE VAN ORSDEL.

51 In Court of Appeals of the District of Columbia

[Title omitted.]

Designation of Record filed January 14, 1931

In the preparation of the transcript of the record herein in the matter of the petition for certiorari to the Supreme Court of the United States, the clerk will please include therein the following:

1. The printed transcript.
2. The argument.
3. The opinion of the court.
4. The judgment.
5. This designation.

JAMES F. REILLY,
Attorney for appellant,
Investment Building, Washington, D. C.

52 [File endorsement omitted.]

53 [Clerk's certificate to foregoing transcript omitted in printing.]

54 Supreme Court of the United States

[*Order allowing certiorari. Filed February 25, 1931*]

The petition herein for a writ of certiorari to the Court of Appeals of the District of Columbia is granted, limited to the question raised by the exception to the ruling of the trial court on the examination on voir dire of prospective jurors.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[Indorsement on cover:] In forma pauperis. File No. 35,605. District of Columbia Court of Appeals. Term No. 683. Alfred Scott Aldridge, petitioner, vs. The United States of America. Petition for a write of certiorari and exhibit thereto. Filed January 27, 1931. File No. 35,605.

U. S. GOVERNMENT PRINTING OFFICE: 1931

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1930.

No. 683

ALFRED SCOTT ALDRIDGE, PETITIONER,

vs.

UNITED STATES OF AMERICA.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA AND BRIEF IN SUPPORT THEREOF.

JAMES F. REILLY,
Attorney for Petitioner,
Investment Building,
Washington, D. C.

(35,605)

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1930.

No. 683

ALFRED SCOTT ALDRIDGE, PETITIONER,

vs.

UNITED STATES OF AMERICA, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA AND BRIEF IN SUPPORT THEREOF.

Alfred Scott Aldridge, petitioner herein, prays that a writ of certiorari issue to review the judgment of the Court of Appeals of the District of Columbia in the above-entitled cause entered January 6, 1931 (R. 49).

Questions Presented.

Petitioner was indicted and convicted of murder in the first degree. He was sentenced to death (R. 6).

Petitioner was tried twice. At the first trial the jury disagreed. At the second trial counsel requested the trial court to permit an inquiry of prospective jurors to ascertain whether any of them would entertain racial prejudices in a case wherein the defendant was a negro and the deceased a white policeman (R. 10). The request was based upon the fact that at the first trial hereof counsel was informed that one juror did entertain racial prejudices and that fact influenced the juror's deliberations (R. 10). The trial court, however, refused to allow the inquiry. With an exception duly noted, the trial proceeded.

2. The second question presented is the refusal of the trial court to withdraw from the consideration of the jury the question of the defendant's guilt of first degree murder, for the reason that there was no evidence of deliberation or premeditation, requisite to constitute murder in the first degree in the District of Columbia (R. 35, 37).

Statement of the Case.

In the early morning of July 6, 1929, petitioner and his brother were apprehended by a white police officer, the decedent herein. At the time of the arrest the officer was in an automobile and ordered petitioner and his brother to enter. They did so. The automobile and its occupants proceeded from the place of arrest to 17th and Q Streets northwest, Washington, D. C., a distance of approximately four blocks. At the

latter location the car was stopped and immediately a shot was heard inside. Petitioner jumped out of the automobile and ran west on Q Street. The brother likewise alighted and proceeded to run north on 17th Street, northwest. McDonald, the officer, got out of the automobile, fired at the petitioner, missed him, but then shot and killed his brother. Two days later the defendant was arrested, and when taken to the police station admitted his identity, but insisted that his brother had fired the fatal shot. He informed the police of the location of his gun and they immediately found it. When presented with it by the police, the defendant admitted that it was the gun used by him on the night of the tragedy. It contained two empty shells. McDonald subsequently died. At the trial of this cause experts testified that the bullet causing the death of McDonald had been fired from petitioner's gun. At the time of his arrest petitioner was confronted with the statement that it was impossible for his brother to have fired the fatal shot for the reason that there were no empty shells found in his brother's revolver at the time of the tragedy. To which the defendant replied, "Well, I am ready to take my medicine." At the trial hereof petitioner took the stand in his own behalf, denied that he had killed the deceased officer, but insisted that his brother had done so. As has been heretofore set forth, petitioner was tried twice. At the first trial the jury were discharged after twenty-two hours of deliberation for the reason

that they were unable to agree. Petitioner was subsequently tried, convicted and sentenced to death.

Reasons for the Allowance of the Writ.

1. There is a distinct conflict between the opinion of the Court of Appeals of the District of Columbia rendered herein and the opinion of the Circuit Court of Appeals of the Sixth Circuit rendered in the case of *Beatty v. United States,* 27 Fed. (2d) 323, 324, wherein a question closely analogous to the question herein presented was decided in favor of the contention of this petitioner.

2. That the Court of Appeals of the District of Columbia has failed to give proper effect to the decisions of this court rendered in the case of *Queen v. Hepburn,* 7 Cranch 290, 297; *Connor v. United States,* 158 U. S. 408, 413, and *Reynolds v. United States,* 98 U. S. 146.

3. The examination of the jury upon the *voir dire* goes to the very fundamental right of trial by jury.

4. The decision of the lower court unreasonably limiting counsel in the examination of prospective jurors relative to prejudice deprives the defendant of a fair and impartial trial, uninfluenced by passion, prejudice or sympathy.

5. The opinion of the Court of Appeals of the District of Columbia fails to give proper effect to the decision of this court rendered in the case of *Allen v. United States,* 164 U. S. 492.

6. The opinion of the Court of Appeals of the District of Columbia rendered herein conflicts with the weight of authority in announcing as a positive rule of law that deliberation and premeditation in the matter of a homicide may be instantaneous, when the very words themselves contradict the decision.

7. The decision rendered below is untenable in that it abridges any distinction between first and second degree murder as enacted by Congress for the District of Columbia.

WHEREFORE, the premises considered, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Court, directed to the Court of Appeals of the District of Columbia, commanding that Court to certify and to send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered 5255 and entitled on its docket, "ALFRED SCOTT ALDRIDGE *v.* UNITED STATES", and that the said judgment of the Court of Appeals of the District of Columbia may be reversed, and for such other and further relief as to the Court may seem meet and proper.

ALFRED SCOTT ALDRIDGE,
By JAMES F. REILLY,
Attorney for Petitioner.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1930.

No. 683

ALFRED SCOTT ALDRIDGE, PETITIONER,

vs.

UNITED STATES OF AMERICA, RESPONDENT.

BRIEF IN SUPPORT OF PETITION.

I. The Jurisdiction of this Court.

The jurisdiction of this Court to issue the writ prayed for herein is conferred by Section 240-A of the Judicial Code as amended by the Act of February 13, 1925.

II. The Decision Below is Contrary to the Decisions of this Court.

In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury (United States Constitution, Amendment Six).

The trial of all crimes except in cases of impeachment shall be by jury (Article three, Section two, Clause three, Constitution of the United States).

The defendant in the trial below was charged with the most serious offense in the calendar of crimes. He was twice put on trial. At the first trial the jury were unable to agree and upon the second trial counsel for the defendant requested the Court to question prospective jurors on the *voir dire* relative to racial prejudice (R. 10). Reason therefor was assigned. Counsel informed the Court that he had been advised that one juror constituting the previous panel had probably been influenced in her deliberations by reason of racial prejudice.

It is impossible to determine the existence of prejudice without permitting a *voir dire* examination thereon. It is fundamental that the provisions of the Sixth Amendment contemplate a trial by an impartial jury, by those who feel no bias and entertain no prejudice towards the accused.

In the case of *Queen v. Hepburn,* 7 Cranch 297, a slave sought his freedom. A prospective juror announced that he detested slavery. He was excused for cause, to which an exception was noted. Chief Justice Marshall in announcing the decision of this Court upon that particular point, said:

> "It is certainly much to be desired that jurors should enter upon their duties with minds entirely free from every prejudice. Perhaps on general and public questions it is scarcely possible to avoid receiving some prepossessions, and where a private right depends on such a ques-

> tion the difficulty of obtaining jurors whose minds are entirely uninfluenced by opinions previously formed is undoubtedly considerable. Yet they ought to be superior to every exception; they ought to stand perfectly indifferent between the parties, and although the bias which was acknowledged in this case might not perhaps have been so strong as to render it positively improper to allow the juror to be sworn on the jury, yet it was desirable to submit the case to those who felt no bias either way."

In the instant case life and death were at stake. Information tended to establish and the trial Court was advised that at the first trial prejudice did exist (R. 10), yet the trial Court denied to the defendant the right to inquire in order to determine its existence. The language of this Court rendered in *Queen v. Hepburn, supra,* jurors "ought to stand perfectly indifferent between the parties", is plain. The expression "it was desirable to submit the case to those who felt no bias either way" is distinct. Both were announced by this Court in *Queen v. Hepburn, supra,* and both were ignored in the trial Court and in the Court below.

And again in the case of *Connors v. United States,* 158 U. S. 408, 413, the defendant was indicted for election frauds and upon the trial thereof his counsel sought to ascertain from prospective jurors the question of their political affiliations. The trial Court refused to allow defendant so to do, and the question was presented to the Supreme Court of the United States. This Court, speaking through Mr. Justice Harlan, reviewed *Queen v. Hepburn, supra,* and announced that:

> "It is quite true, as suggested by the accused, that he was entitled to be tried by an impartial jury, that is by jurors who had no bias or prejudice, that would prevent them from returning a verdict according to law and the evidence. It is equally true that a suitable inquiry is permissible in order to ascertain whether the juror has any bias, opinion, or prejudice that would affect or control the fair determination by him of the issues to be tried."

It is the birthright of every citizen when charged with crime to be tried and punished according to law. The organic law as embodied in the Constitution provides for trial by an *impartial* jury (Amendment six, Constitution of the United States). A suitable and pertinent inquiry is indispensable to determine whether prospective jurors are impartial. If this inquiry is denied, then the defendant has no means of determining the impartiality of the jury weighing in its very hands his right to live.

It is respectfully submitted that one of the simplest and plainest constitutional provisions was infringed when the trial Court herein refused to inquire as to racial prejudice.

The lower Court in its opinion in the instant case said (R. 46-47):

> "In a jurisdiction like the District of Columbia, where the colored race is accorded all the privileges and rights under the law, that are afforded the white race, and especially the right to practice in the courts, serve on the jury, etc., we are of the opinion that there was no abuse of

> discretion on the part of the trial court in refusing to permit the question to be answered by the jurors."

It is respectfully submitted that the lower Court erred in applying such a test. This Court should take judicial notice that racial prejudice does exist. The unfortunate race riots in the District of Columbia about 1920 are well within the memory of all.

If a prospective juror had answered the pertinent question relative to racial prejudice in the affirmative, then undoubtedly he would be wholly unfit and incompetent to serve as a juror.

In the case of *Reynolds v. United States*, 98 U. S. 146, Mr. Chief Justice Waite, in speaking of the determination by the trial Court of a formed opinion by a prospective juror, so as to render him competent or incompetent, said:

> "To make out the existence of the fact the juror who is challenged may be examined on his *voir dire* and asked any questions that do not tend to his infamy or disgrace."

Prejudice against a negro charged with having killed a white man is equally as devastating to the impartiality of a juror as a formed opinion. Other cases in harmony with petitioner's contention are:

Beatty v. United States, 27 Fed. (2d) 323, 324.
Pinder v. State, 27 Fla. 370, 8 So. 837.
State v. Madrid, 12 Fla. 151.
Pierce v. State, 13 New Hamp. 536.
People v. Reyes, 5 Cal. 347.

People v. Car Soy, 57 Cal. 102.
People v. Christie, 2 Park Crim. R. (N. Y.) 579.
Jones v. State, 2 Black. 475 (Ind.).
Lester v. State, 2 Texas App. 432.
State v. McAfee, 64 N. C. 339.
Hill v. State, 72 So. 1003.

The cases above cited are from every geographic section of the country and conclusively establish that the pertinent question should have been permitted. They also establish that racial prejudice is not confined to particular localities.

III. Conflicting Federal Appellate Decisions.

The decision rendered herein by the Court of Appeals of the District of Columbia sanctioning the refusal of the trial Court to inquire of prospective jurors relative to the entertainment by them of racial prejudice is inconsistent with the decision of the Circuit Court of Appeals for the Sixth Circuit rendered in the case of *Beatty v. United States*, 27 Fed. (2d) 323. In the Beatty case, *supra*, the prosecution was for a violation of the National Prohibition Act. Upon the *voir dire* examination counsel sought to elicit whether prejudice in favor or against the National Prohibition Act existed. Although the conviction was affirmed, the Court said:

> "The conviction must be affirmed, but the record discloses what we think is a misapprehension as to the practice. Upon examination of the jury by the judge, respondent's counsel

proposed six question which he wished to have put. The request was declined, and the judge asked questions which he thought covered the ground of these requests, so far as they were proper. The matter was apparently regarded by counsel, and perhaps by the trial judge, as if the criterion were whether the questions suggested, if answered in one way, would disclose grounds for challenge for cause, overlooking the right of respondent to get information aiding him to determine whether he wished to make a peremptory challenge. Obviously, the quest for this information is subject to the reasonable discretion of the trial judge, and cannot be carried too far without minimizing the good effect of examination by the judge instead of by counsel; but a reasonable amount of such inquiry in aid of the right of peremptory challenge should be permitted, and we think one of these questions was of that permissible character. It inquired whether any member of the jury was a member of or contributed to any organization for the purpose of enforcing the prohibition law. In Remus *v.* United States, 291 F. 501, 507, we held that an affirmative answer to this question would not disclose legal basis for challenge for cause; but, quite plainly, it would be a natural inducement as to the exercise of a peremptory challenge. While it would not be presumed that a juror would have, from such association, any prejudice which would prevent him from obeying the instructions of the court, yet we must regard such information as this as within that minimum which respondent is entitled to have as the basis of a peremptory challenge. See Armborst *v.* Cincinnati Co. (C. C. A. 6) 25 F. (2d) 240, 241."

The decisions of this Court are harmonious with the plain and unequivocal language of the Constitution. Trial by an impartial jury does not mean trial by a jury any one of whose constituents entertains prejudice. To deny to this petitioner the right to inquire whether a jury is impartial violates the very fundamental right of trial by jury and deprives to the defendant that right so sacredly given to him in the Constitution itself.

By Section 918 of the District of Columbia Code the accused and the prosecution are allowed, in capital cases, twenty peremptory challenges. Such a right cannot be intelligently exercised unless a rightful inquiry is permitted counsel to determine the fitness of prospective jurors.

It is respectfully submitted that the lower Court erred in sustaining the trial Court and that this Court should review and reverse the decision therein rendered.

IV. The Erroneous Opinion as to the Distinction Between First and Second Degree Murder as Announced by the Lower Court Contrary to the Decisions of this Court.

Murder in the first degree as defined by Congress and enacted in Section 798 of the Code of Law for the District of Columbia is as follows:

> "*Murder in First Degree.*—Whoever, being of sound memory and discretion, purposely, and either of deliberate and premeditated malice or by means of poison, or in perpetrating or in attempting to perpetuate any offense punishable

by imprisonment in the penitentiary, kills another, is guilty of murder in the first degree."

Section 800 reads as follows:

> "*Murder in Second Degree.*—Whoever, with malice aforethought, except as provided in the last two sections, kills another, is guilty of murder in the second degree."

The distinction between first and second degree murder under the District of Columbia Code will thus be seen to be whether it was done purposely and with deliberate and premeditated malice or with malice aforethought. This is a very narrow and quite imperceptible margin of difference. The statute, of course, limits the common-law crime of murder.

The lower Court announced that deliberation and premeditation may be instantaneous. This is in direct conflict with the decision of this Court announced in the case of *Allen v. United States*, 164 U. S. 492, wherein this Court said:

> "The substance of the lower court's instruction is that the intent necessary to constitute malice aforethought, need not have existed for any particular time before the act of killing, but that it may spring up at the instant and may be inferred in the act of killing. This is within the authorities as applied to the common law crime of murder, though where the crime is *classified* as in some states, proof of deliberate premeditation is necessary to constitute murder in the first degree."

This Court announced, "Where the crime is classified as in some States, proof of deliberate premedita-

tion is necessary to constitute murder in the first degree." Congress has *classified* murder in the District of Columbia. It is therefore respectfully submitted that the decision of the lower Court is directly in conflict with the decision of this Court as announced in *Allen v. United States, supra.*

An analysis of the words "deliberate" and "premeditated" indicates that each contemplates a function of the mind, that is, a weighing in the mind beforehand the deliberate intent to kill. The term "instantaneous" used by the lower Court can only be analyzed to mean "simultaneously", "on the instant". The decision of the lower Court utterly wipes away the distinction made between the common-law and the statutory crime of murder. Its doctrine is untenable. We revert to the original common-law crime.

In the case of *State v. Mangano,* 77 N. J. Law 544, 72 Atl. 366, 368, the defendant was tried and convicted of murder in the first degree. The trial Court in its charge said:

> "Premeditation does not require any length of time, a moment of time is sufficient. If you find from the evidence that the defendant had formed in his mind an intent to kill and then *instantly* he deliberately perpetrated the act to carry out the intention, that is deliberation and premeditation which the law requires in order to make it murder in the first degree."

The Court of Errors and Appeals of New Jersey in passing upon this charge said:

> "The noticeable feature of this instruction is, of course, the apparent, and as we think, the

> actual incongruity of the two adverbs 'instantly' and 'deliberately'."

It further said:

> "The result of combining in the same thought the words 'instantly' and 'deliberately' was to create an irreconcilable incongruity necessarily confusing to the jury and in our judgment incapable of being resolved conformably to the legal principle essential to a proper definition of murder in the first degree."

The statute of New Jersey as passed upon by the Court of Errors and Appeals of New Jersey is similar to the statute enacted by Congress for the District of Columbia. The New Jersey statute is as follows:

> "Murder perpetrated by means of poison or by lying in wait or by any other kind of wilful, deliberate and premeditated killing shall be murder in the first degree."

It is respectfully submitted that the decision of the New Jersey Court is entirely consistent with law and reason and the decision of the Court of Appeals of the District of Columbia rendered herein entirely irreconcilable with the weight of authority.

Murder in the first degree cannot be predicated on the mere existence of an intent to kill at the time of committing the crime. There must be deliberation and premeditation and a purpose to kill. Normally, premeditation comes first, an entertainment by the mind of a design to kill, then follows deliberation, the weighing of considerations pro and con, after which the killing being determined upon becomes wilful, deliberate

and premeditated in the sense intended by the Statute.

In the case of *Perkins v. Oxford Paper Company*, 104 Maine 109, 71 Atl. 476, 479, the court interpreted "instantaneous" as follows:

> "Instantaneous means done or occurring in an instant, or without any perceptible duration of time."

Likewise, in the case of *Antonian v. Southern Pacific Company*, 9 Cal. App. 718, 100 Pac. 877, 884, the California Appellate Court interpreted "instantly" as follows:

> "Instantly implies without any intervention of time, allows not a particle of delay, and makes an interval too small to be appreciated."

Again, in the case of *Sawyer v. Perry*, 88 Maine 42, 33 Atl. 660, 661, "instantaneous" was interpreted as follows:

> "Instantaneous means done or occurring in an instant or without any perceptible portion of time, as the passage of electricity appears to be instantaneous."

It is respectfully submitted that in stating a legal proposition of such importance as that which involves first degree murder, it is impossible to be too exact. The decision of the lower Court is inconsistent and irreconcilable with the decisions of this Court and the weight of authority and should be reversed.

Second degree murder is the killing of another with malice aforethought. "Aforethought" analyzed can only be interpreted as the thinking over of the act be-

fore the killing. Obviously, therefore, the lower Court's decision that a deliberate and premeditated killing may be instantaneous is erroneous and utterly inconsistent with reason and logic and violative of every sound principle of law.

V. The Petition Should Be Granted.

It is respectfully submitted that a serious constitutional question is herein involved and a very serious question of law presented. This Court should grant the petition prayed for herein and the judgment below reversed.

JAMES F. REILLY,
Attorney for Petitioner,
Investment Building,
Washington, D. C.

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CHARLES ELMORE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1930.

No. 683

ALFRED SCOTT ALDRIDGE, PETITIONER,

vs.

THE UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

BRIEF ON BEHALF OF PETITIONER.

JAMES F. REILLY,
Investment Building,
Washington, D. C.,
Attorney for Petitioner.

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BRIEF ON BEHALF OF PETITIONER.

Opinion of the Court Below.

The opinion of the Court of Appeals of the District of Columbia in the above-entitled cause may be found at page 45 of the record. It is not at this time officially reported.

1*y*

Jurisdiction of This Court.

The judgment of the Court of Appeals of the District of Columbia affirming judgment of the Supreme Court of the District of Columbia was rendered January 6, 1931 (R. 45). On February 25, 1931, this Court granted a writ of certiorari under and by virtue of Section 240-A of the Judicial Code, as amended by the Act of February 13, 1925.

Question Presented.

The sole question presented herein attacks the validity of the ruling of the trial Court prohibiting a *voir dire* examination of prospective jurors relative to racial prejudice.

Statement of the Case.

The defendant, in appearance and in fact a negro, twenty-two years old, was indicted for murder in the first degree. The indictment charged that defendant killed Harry J. McDonald, a white police officer. A plea of not guilty was entered. In the month of January, 1930, the defendant was tried, but the jury were unable to agree. Shortly thereafter, on, to wit, the 15th of February, 1930, he was again placed on trial. At the time the trial Court was conducting an examination of the jury upon its *voir dire*, counsel for petitioner proposed and requested that the trial judge question prospective jurors relative to racial prejudice (R. 10). The Court was informed that subsequent to the first trial and prior to the second trial counsel

was advised that one of the members constituting the previous jury entertained racial prejudice, which fact may have influenced the juror's deliberations. The request was denied, the Court observing (R. 10):

> "I do not think that would be a proper question, any more than to ask whether they like an Irishman or a Scotchman."

Counsel noted an exception (R. 11) and the trial proceeded. The Government exercised four peremptory challenges and the defense five.

The defendant was subsequently convicted of murder in the first degree and sentenced to death (R. 6).

ARGUMENT.

The only question herein involved is the right of a defendant in a criminal prosecution to inquire of prospective jurors whether they entertain racial prejudice. It is respectfully submitted that this question is a proper and pertinent one. The Constitution of the United States (Amendment VI) specifically provides that in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an *impartial* jury.

Petitioner was charged with the most serious offense in the calendar of crimes. At his first trial, the jury disagreed. Counsel having been informed that racial prejudice may have somewhat influenced the deliberations of the first jury, had a right, indeed was in duty bound, to propound to prospective jurors the pertinent question. The trial Court was informed of the reason

therefor. Notwithstanding this foundation, together with the plain mandate of the Constitution of the United States, petitioner was denied the right to determine whether the jury which was to pass upon his guilt or innocence was in fact impartial.

It is the birthright of every American citizen when charged with crime to be tried and punished according to law. The organic law as embodied in the Constitution provides for trial by an *impartial* jury (Amendment VI, Constitution of the United States). A suitable and pertinent *voir dire* inquiry is indispensable to determine whether prospective jurors are impartial. If this inquiry is denied, obviously the defendant is unable to determine the impartiality of the jury weighing in its very hands his right to live. The principle of this contention has frequently been announced by this Court.

In the case of *Queen v. Hepburn*, 7 Cranch 297, a slave sought his freedom. A prospective juror announced that he detested slavery. He was excused for cause, to which an exception was noted. Chief Justice Marshall in announcing the decision of this Court upon that particular point, said:

> "It is certainly much to be desired that jurors should enter upon their duties with minds entirely free from every prejudice. Perhaps on general and public questions it is scarcely possible to avoid receiving some prepossessions, and where a private right depends on such a question the difficulty of obtaining jurors whose minds are entirely uninfluenced by opinions previously formed is undoubtedly considerable.

> Yet they ought to be superior to every exception; they ought to stand perfectly indifferent between the parties, and although the bias which was acknowledged in this case might not perhaps have been so strong as to render it positively improper to allow the juror to be sworn on the jury, yet it was desirable to submit the case to those who felt no bias either way."

In the instant case life and death were at stake. Information tended to establish and the trial Court was advised that at the first trial prejudice did exist (R. 10), yet the trial Court denied to the defendant the right to inquire as to its existence. The language of this Court rendered in *Queen v. Hepburn, supra,* "Jurors ought to stand perfectly indifferent between the parties", is plain. The expression "It was desirable to submit the case to those who felt no bias either way" is distinct. Both were announced by this Court in *Queen v. Hepburn, supra,* and both were ignored herein.

Again, in the case of *Connors v. United States,* 158 U. S. 408, 413, the defendant was indicted for election frauds. Upon the trial thereof his counsel sought to ascertain from prospective jurors their political affiliations. The trial Court refused to allow defendant so to do. The question was presented to the Supreme Court of the United States. This Court, speaking through Mr. Justice Harlan, reviewed *Queen v. Hepburn, supra,* and announced that:

> "It is quite true, as suggested by the accused, that he was entitled to be tried by an impartial jury, that is by jurors who had no bias or preju-

> dice, that would prevent them from returning a verdict according to law and the evidence. It is equally true that a suitable inquiry is permissible in order to ascertain whether the juror has any bias, opinion, or prejudice that would affect or control the fair determination by him of the issues to be tried."

It is respectfully submitted that one of the simplest and plainest constitutional provisions was infringed when the trial Court refused to inquire as to racial prejudice.

The Court of Appeals in its opinion in the instant case said (R. 46-47):

> "In a jurisdiction like the District of Columbia, where the colored race is accorded all the privileges and rights under the law that are afforded the white race, and especially the right to practice in the courts, serve on the jury, etc., we are of the opinion that there was no abuse of discretion on the part of the trial court in refusing to permit the question to be answered by the jurors."

It is submitted that the Court of Appeals erred in applying such a test. This Court should take judicial notice that racial prejudice may exist. The unfortunate race riots in the District of Columbia about 1920 are well within the memory of all. In this case the Court of Appeals of the District of Columbia broadened its decision rendered in the case of *Crawford v. United States*, 41 F. (2d) 979, wherein it held the question unnecessary for the reason that a general question was put to the jurors by the trial Court which was

sufficiently broad and comprehensive to embrace any question of prejudice that might be raised from the fact that the defendant belonged to the colored race and the deceased to the white race.

The general question deemed sufficient by the Court inquired as to the ability of prospective jurors under all circumstances to give the defendant a fair and impartial trial, in accordance with the evidence.

The record will be searched in vain in the instant case for any such comprehensive question. The record, however, does disclose (R. 10) that the Court inquired as to prejudice against circumstantial evidence, and likewise as to the existence of conscientious scruples against the death penalty.

It is difficult to reconcile the reasoning of the trial Court herein. If a prospective juror had answered the pertinent question relative to racial prejudice in the affirmative, then undoubtedly he would have been wholly unfit and incompetent to serve as a juror.

Mr. Chief Justice Waite, in *Reynolds v. United States*, 98 U. S. 146-155, speaking of the determination by the trial Court of a formed opinion by a prospective juror, so as to render him competent or incompetent, said:

> "To make out the existence of the fact the juror who is challened may be examined on his *voir dire* and asked any questions that do not tend to his infamy or disgrace."

Prejudice against a negro charged with having killed a white man is equally as devastating to the impartiality of a juror as a formed opinion.

In *People v. Reyes et al.*, 5 Cal. 347, 349, decided by the Supreme Court of California in 1855, the defendants, who were Mexican citizens, were indicted for assult with intent to murder. At that time the infamous Know Nothing Society existed. The doctrine of the society embraced, among other things, a prejudice against Catholic foreigners. Various questions were propounded to prospective jurors seeking to ascertain whether any of them entertained prejudice against foreigners or whether they would extend to the defendants the same rights, privileges and protection that they would to men of local birth. The trial Court refused the question. The Supreme Court of California in passing thereon said:

> "Wherever the right of trial by jury exists, the law in all cases contemplates that each and every juror who sits in a cause should have a mind entirely free from all bias or prejudice of any kind whatsoever. In order to arrive at the condition of the person's mind who is offered as a juror a party is permitted to ask of the juror himself questions, the answers to which may tend to show whether he is prejudiced in the cause which he is about to undertake to decide."

The Court further said (page 350):

> "If the person called had not taken an obligation which would prejudice him against foreigners in such a manner as to imperil their rights in a court of law, he could say so and the answer would be harmless. If, upon the other hand, he had taken oaths and was under obligation which

> influenced his mind and feelings in such a manner as to deny to a foreigner an impartial trial, he is grossly unfit to sit as a juror and such facts should be known."

In the case of *People v. Car Soy*, 57 Cal. 102-103 (Supreme Court Calif., 1880), the defendant, a Chinaman, was prosecuted for robbery. His counsel proposed to ascertain if prospective jurors would give the same credence to the statements of a Chinaman as they would to a white man. The question was denied by the trial Court. Upon appeal, however, the Supreme Court of California said:

> "Each party has a right to put questions to a juror to show not only that there exists proper grounds for a challenge for cause but to elicit facts to enable the party to decide whether he will make a peremptory challenge. The defendant had a right to put these questions as they were pertinent for either purpose."

In the Circuit Court of Appeals of the Sixth Circuit, in the recent case of *Beatty v. United States*, 27 F. (2d) 323-324, the examination of the jury by the judge disclosed that the defendant's counsel proposed six questions which he wished to have put to the jury. The request was declined and the judge asked questions which he thought covered the ground of these requests so far as proper. Upon appeal the Circuit Court of Appeals said:

> "The matter was apparently regarded by counsel and perhaps by the trial judge, as if the criterion were whether the question sug-

gested, if answered in one way, would disclose grounds for challenge for cause, overlooking the right of defendant to get information aiding him to determine whether he wished to make a peremptory challenge. Obviously, the request for this information is subject to the reasonable discretion of the trial judge and cannot be carried too far without minimizing the good effect of examination by the judge instead of by counsel; but a reasonable amount of such inquiry in aid of the right of peremptory challenge should be permitted and we think one of these questions was of that permissible character. It inquired whether any member of the jury was a member of or contributed to any organization for the purpose of enforcing the prohibition law."

The Court then proceeded to announce the law, that upon the trial in a prohibition case an affirmative answer to this question would not disclose legal basis for challenge for cause, but quite plainly it would be a natural inducement as to the exercise of the peremptory challenge.

In the case of *Pinder v. State*, 27 Fla. 370, 374, 8 So. 837, the Supreme Court of Florida passed upon a case where the defendant, a negro, was convicted of murder and sentenced to death. The deceased was a white man. His counsel, when examining the jury on the *voir dire*, propounded a question relative to racial prejudice. The lower Court refused to allow the question and, upon appeal, the Supreme Court of Florida said:

"We think the court erred in refusing to permit this question to be propounded to the

jurors * * *. It was a pertinent and, as we think, a proper question to test fully the existence of bias or prejudice in the minds of jurors. It sought to elicit a fact that was of the most vital importance to the defendant, and a fact, if existent, was locked up entirely in the breasts of the jurors to whom the question was propounded, a knowledge of the existence of which could only be acquired by interrogating the juror himself. The answer to it, if in the affirmative, could have worked no harm to the juror or to anyone else, but would have done credit to the humanity and intelligence of the juror and would have satisfactorily exhibited to the court and to the defendant his entire competency so far as the element of bias or prejudice was involved. But if the answer to it had been in the negative, then we have no hesitancy in saying that it would have shown them to have been wholly unfit and incompetent to sit upon the trial of a man of the negro race, whose right to a fair and impartial jury is as fully guaranteed to him under our Constitution and laws as to the whitest man in Christendom; and such incompetency asserts itself with super-added force in such a case as this, where life or death of the defendant was the issue, to tip the scale in the jury's hands for adjustment."

This case cited in support thereof the following cases:

State v. Madrid, 12 Fla. 151;
Pierce v. State, 13 N. H. 536;
People v. Reyes, 5 Cal. 347;
People v. Car Soy, 57 Cal. 102;

People v. Christie, 2 Park. Crim. R. (New York) 579;
Jones v. State, 2 Blackf. 475 (Indiana);
Lester v. State, 2 Texas App. 432.

Again, in the case of *State v. McAfee*, 64 N. C. 339-340 (1870), counsel for the defendant proposed to ask the jurors "If he could, as a juror, do equal and impartial justice between the State and a colored man, the prisoner being colored." The trial Court refused to allow the question and, upon appeal, the Supreme Court of North Carolina said:

> "The causes of challenge to the favor are so numerous as to be described by Lord Coke as 'Infinite'. Any fact or circumstance may be given in evidence tending to suggest bias, partiality or prejudice on either side. Not only may his declarations to others be shown but a juror is bound to answer on oath any question touching his competency unless it tend to degrade or render him infamous. It is essential to the purity of trial by jury that every juror shall be free from bias. If his mind had been poisoned by prejudice of any kind, whether resulting from reason or passion, he is unfit to sit on a jury. Here the court refused to allow a proper question to be put to the juror in order to test his qualifications. Suppose the question had been allowed and the juror had answered that the state of his feelings toward the colored race was such that he could not show equal and impartial justice between the state and the prisoner, especially in charges of this character, it is at once to be seen that he would have been grossly unfit to sit in the jury box."

Citing *People v. Reyes*, 5 Cal. 347; *State v. Benton*, 2 D. & B. 196.

Again, in *Hill v. State*, 72 So., page 1003, decided by the Supreme Court of Mississippi in the year 1916, the appellant was convicted of murder in the first degree and sentenced to death. His counsel at the trial proposed to ask if any of the prospective jurors had any prejudice against the negro that would induce them to return a verdict on less or slighter evidence than they would return a verdict of guilty against a white man under the same circumstances. The trial Court refused to allow the question, and upon appeal the Supreme Court of Mississippi held:

> "We think the trial judge erred in refusing to allow the jury to be examined with reference to race prejudice. The defendant was a negro and was being tried by white men. *If for no other purpose than to exercise intelligently his right to peremptorily challenge jurors, the defendant had a right to inquire with reference to any bias or prejudice, on account of race, that might exist in the minds of any juror tendered to him.*"

In the case of *People v. Christie*, 2 Parker's Criminal Reports (New York) 579, the defendant was indicted for riot. The facts established that on July 4, 1853, the Ancient Order of Hibernians, a Catholic Irish organization, was having a parade in New York City. It resulted in a riot. Upon the trial of the defendant, it developed that ill feeling existed between the Ancient Order of Hibernians and the United Americans, a rival organization. Counsel proposed to question

prospective jurors relative to religious prejudice. Upon appeal the Court ruled that the question should have been permitted.

In the ancient case of Peter Cook, reported in 13 State Trials 334, decided in 1696 (Old Bailey), Chief Justice Tribby was presiding and the defendant, Cook, was on trial for treason. The Court in examining the jury said:

> "If any man in this panel have any particular displeasure to the prisoner, or be unindifferent, or have declared himself so, I do admonish and desire him to discover so much in general for it is not fit, nor for the honor of the King's justice, that such a man should serve on the jury."

In *People v. Vermilyea*, 7 Cowen 121 (Supreme Court New York, 1827), the Court, in speaking of the qualifications of a juror, said:

> "It is admitted that every citizen, whether arraigned for crime or impleaded in a civil action, is entitled to a trial by a fair and impartial jury. The trial by jury is justly considered an invaluable privilege, but it would become a mockery if persons who had prejudged the case were admitted as impartial triors. Lord Coke (1 Coke *v.* Littleton, 155, 156) says 'he ought to be least suspicious, that is, to be indifferent, as he stands unsworn, and then he is accounted in law, liber et legatis homo; otherwise he may be challenged, and not suffered to be sworn.
>
> "What is meant by a person standing indifferent? Manifestly, that the mind is in a state of neutrality, as respects the person and the matter to be tried; that there exists no bias, for

> or against either party, in the mind of the juror, calculated to operate upon him; that he comes to trial with a mind uncommitted and prepared to weigh the evidence in impartial scales."

In the trial of Aaron Burr for treason, Vol. 1, Burr Trials, pages 369 and 379, Chief Justice Marshall gives a most interesting dissertation upon the importance of an impartial jury. The Court said:

> "It was certainly one of the clearest principles of natural justice that a juryman should come to a trial of a man for life with a perfect freedom from previous impressions; that it was clearly the duty of the Court to obtain, if possible, men free from such bias. * * * This was not more a principle of natural justice than a maxim of the common law, which we have inherited from our forefathers. The same right was secured by the Constitution of the United States which entitles every man under a criminal prosecution to a fair trial by an impartial jury."

The petitioner herein was tried under circumstances calling for the strictest indifference on the part of the jury. It required patience, reason, and common sense. Passion, prejudice, or sympathy would be devastating to a fair and impartial trial. A reading of the record will disclose that the widow of the decedent was a pitiful figure in the court-room (R. 23, 24, 25). Her conduct necessarily engendered antipathy towards accused. Counsel for the defendant refrained from cross-examining the witness purely out of consideration for her (R. 24). It is impossible to present to this

Court the feeling, the prejudice, and the passion that existed herein.

It is respectfully submitted that those against whom prejudice is directed should be permitted a suitable inquiry, in order to determine its existence. No one can gainsay that prejudice exists in the District of Columbia. No one can deny that religious and racial prejudice exist throughout the length and breadth of the land. Cases have been cited to this Court from every geographical section of the country showing that prejudice in one form or another exists almost everywhere. It was error for the Court of Appeals of the District of Columbia to have ruled that defendant could not inquire as a matter of right whether such prejudice existed. The right to practice in courts is not decisive of its existence nor does it obliterate it. The right to sit upon a jury is equally indecisive and unobliterative. To practice as counsellors in the courts, to serve on the jury, are privileges long ago granted to members of every race and creed. When exercising their respective functions those who practice law and those who serve on juries are themselves frequently the victims of race prejudice.

The decisions of this Court are harmonious with the plain and unequivocal language of the Constitution. Trial by an impartial jury means exactly what it states. To deny to petitioner the right to inquire whether a jury is impartial violates the very fundamental right of trial by jury and deprives him of that right so sacredly given to him in the Constitution itself.

Congress has enacted Section 918 of the District of Columbia Code, which permits in capital cases twenty peremptory challenges to the prosecution and to the defense. Neither rhyme nor reason have to be cited as cause to exercise such a challenge, but, in order to intelligently exercise it, a suitable and a rightful *voir dire* inquiry must be permitted. The refusal of the trial Court to permit the pertinent questions abridges the benefits intended to be given by the Code.

Conclusion.

The right to trial by an impartial jury has been thoroughly embedded in our institutions as free men. The common law provided therefor; the Constitution of the United States reiterated this common-law doctrine. It is based upon reason, law, and common sense. Petitioner had a right to ascertain whether the jury which was to pass upon his guilt or innocence was impartial. This doctrine imposes itself with superadded force when life and death are at stake. The refusal of the trial Court to inquire relative to racial prejudice was erroneous. The Court of Appeals committed error in sustaining the trial Court.

It is respectfully submitted the cause should be reversed.

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No. 683

In the Supreme Court of the United States

OCTOBER TERM, 1930

ALFRED SCOTT ALDRIDGE

v.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

BRIEF ON BEHALF OF THE UNITED STATES

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OPINION OF THE COURT BELOW

The opinion of the Court of Appeals of the District of Columbia in the above-entitled case may be found at Page 45 of the Record. It is not at this time officially reported.

JURISDICTION OF THIS COURT

The judgment of the Court of Appeals of the District of Columbia affirming the judgment of the Supreme Court of the District of Columbia was entered January 6, 1931. (R. 49.) On February 25, 1931, this Court granted certiorari, pursuant to Section 240–(a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

In granting the writ, this Court limited the arguments and the briefs to the question raised by the ruling of the trial court prohibiting a voir dire examination of prospective jurors relative to racial prejudice. (R. 49.)

STATEMENT OF THE CASE

The defendant, a negro, twenty-two years old, was indicted for murder in the first degree. (R. 3.) The indictment charged that the defendant killed Harry J. McDonald, a white police officer. A plea of not guilty was entered. (R. 4.) In the month of January, 1930, the defendant was tried, but the jury was unable to agree. On the 26th of February, 1930, he again was placed on trial. At the time the trial court was conducting an examination of the jury upon its voir dire, counsel for petitioner proposed and requested that the trial judge question prospective jurors relative to racial prejudice. This application was made at the bench, out of the hearing of the prospective jurors, counsel for the petitioner stating that he did not like to ask that question in public. The court was informed by counsel for the petitioner that he had been informed that one of the members constituting the previous jury entertained racial prejudice, which fact, he suggested, may have influenced the juror's deliberations. (R. 10–11.) Observing that that matter dealt with another jury in another case, the court observed (R. 10):

> I don't think that would be a proper question, anymore than to ask whether they liked an Irishman or a Scotchman.

Counsel noted an exception (R. 11), and the trial proceeded. The Government exercised four peremptory challenges and the defense five. (R. 11.)

The defendant subsequently was convicted of murder in the first degree and sentenced to death. (R. 6.)

ARGUMENT

The only question herein involved is the right of a defendant in a criminal prosecution to inquire of prospective jurors whether they entertain racial prejudices.

It is to be noted that counsel did not request the court to interrogate jurors as to any prejudice they might entertain by reason of the fact that the particular defendant in the case on trial was of the colored race.

Therefore it is urged that an effort generally to inquire as to race prejudice, without any particular applicability to the defendant at bar, properly was refused by the court by reason of the form alone of the proposed interrogatory.

The question herein presented has been before the Federal courts on only one occasion other than the case at bar. That also came up in the District of Columbia, in the case of *Crawford* v. *United States,* 41 F. (2d) 979 (Ct. of Appeals). The

opinion of the court on this point is as follows (p. 980):

> In support of this contention, counsel for defendant rely upon the case of *Pinder* v. *State*, 27 Fla. 370, * * * where it was held error, in a trial where the defendant belonged to the negro race, to refuse to ask the jurors the question, "Could you give the defendant, who is a negro, as fair and impartial a trial as you could a white man, * * * upon the same evidence?"
>
> As affecting the discretion of the trial court, in questioning or permitting the questioning of the jury on voir dire, local conditions may have an important bearing. The social situation in Florida, as between white and colored races, may be such as to create a feeling of prejudice that would justify such an inquiry, while the conditions in another state or locality might be such that to refuse the question would not be regarded as prejudicial to the interests of the defendant; * * *.

In the *Crawford case* cited above it is true that the court below, while refusing to ask a somewhat similar question as to racial prejudice, did ask the jurors generally if they knew of any reason why it would not be fair for the prospective jurors to try that case. The record in the case at bar does not disclose that such a question was asked herein. With that sole difference the *Crawford case* is practically identical with the instant case.

In considering the *Crawford case* it is urged that the most important portion of the opinion dealing

with this point is that wherein the court states that local conditions may have an important bearing in determining the question.

To ask a question such as that requested would be to inject into a criminal case in the District of Columbia this unfortunate element of possible race prejudice.

The Fourteenth and Fifteenth Amendments to the Constitution of the United States, taken in conjunction with the statutes of the United States seeking to eradicate any discrimination on the basis of race, color, or creed, must be taken together as indicating a manifest intention of this Government to eliminate in courts of the land anything subversive of our hallowed doctrine that all men are created free and equal—of our cherished pride in our institutions that allow all men to stand equal before the bar of justice.

The contention of the petitioner in this case may be reduced in effect to an application to this Honorable Court to notice judicially that the colored race does not occupy the same position in the courts of the capital of the Nation as does the white race. This contention is made in the face of the assertion of the Court of Appeals of the District of Columbia in this very case that in the District of Columbia the colored race is accorded all the privileges and rights under the law that are afforded the white race, especially the right to practice in the courts, serve on the jury, etc.

To admit of the introduction of such questions into the trial of cases in the Federal courts would be to pave the way for the introduction of questions dealing with religious, political, fraternal, and other allied topics.

No lawyer will deny that any defendant in any criminal case has the right reasonably to inquire of prospective jurors as to facts which may assist that defendant in procuring a fair and impartial jury. On the other hand, no one will deny that a reasonable limitation must be placed upon such a right. No one will concede that this privilege can be carried to absurd or extravagant lengths.

The record in this cause is barren as to any showing or basis that properly would require this Court to ask such question. The record discloses, conformably to the statutes of the United States, that defendant was provided with a list of jurors and of witnesses two full days in advance of the date of trial. (R. 48.) If anything came to the attention of counsel with regard to these prospective jurors that in his estimation would prevent a fair and impartial trial, then no such showing was made to the court.

Possessing a full list of jurors, with their addresses, for several days prior to trial, counsel was in a position where he might ascertain any factor that might impede any juror in arriving at a fair and impartial verdict in the case by reason of any

consideration, such as race prejudice. No such matter was brought to the attention of the court.

Nor does the record disclose that there was anything said in court on the part of any juror that properly would impel the court to propound such a question.

The only thing in the record dealing with even a vestige of a condition existing that would make proper such a question is the bare recital of counsel for the defendant that at the last trial of the case he understood that there was a woman on the jury, a Southerner, who said the fact that the defendant was a negro and the deceased a white man somewhat influenced her. Of course, that was in another case. That took place with regard to another jury. The woman in question was not a member of the jury in this cause. In short, there was nothing even suggesting that there was in the prospective list of jurors in this case anyone who had any such animus. In this case the petitioner availed himself of only five of the twenty peremptory challenges provided him by law. Now, on this petition he asks this Court to reverse the judgment of the lower court on the surmise that the denial of the question requested possibly left on that jury some one with a prejudice against the colored race—with the further conjecture that this person with the prejudice against the colored race could not lay that bias aside and give the petitioner a fair and impartial trial.

In other words, petitioner requests this Court to ignore the finding of both local courts of the District as to local conditions bearing on the proposition of whether or not such question is proper.

An analogous case, in principle, at least, is to be found in *Connors* v. *United States,* reported in 158 U. S. 408. In that case, involving violation of the election laws, this Court reviewed the action of the trial judge in refusing to allow jurors to be questioned as to their political affiliations. The action of the Court was affirmed:

> Particular stress is laid upon the refusal of the court to allow the question to jurors, "Would your political affiliations or party predilections tend to bias your judgment in this case either for or against this defendant?" In the absence of any statement tending to show that there was some special reason or ground for putting that question to particular jurors called into the jury box for examination, it can not be said that the court erred in disallowing it. If the previous examination of a juror on his voir dire or the statements of counsel, or any facts brought to the attention of the court, had indicated that the juror might, or possibly would, be influenced in giving a verdict by his political surroundings, we would not say that the court could not properly, in its discretion, if it had regarded the circumstances as exceptional, have permitted the inquiry whether the juror's political affiliations or

party predilections would bias his judgment as a juror. But no such exceptional circumstances are disclosed by the record, and the court might well have deemed the question—unaccompanied by any statement showing a necessity for propounding it—as an idle one that had no material bearing upon the inquiry as to the qualifications of the juror, and as designed only to create the impression that the interests of the political party to which the accused belonged were involved in the trial. The public should not be taught, by the mode in which trials of this character are conducted, that the prosecution of a crime against the laws securing the freedom and integrity of elections for Representatives in Congress will be regarded by the court as, in effect, a prosecution of a political party to which the accused belongs. If an inquiry of a juror as to his political opinions and associations could ever be appropriate in any case arising under the statute in question, it could only be when it is made otherwise to appear that the particular juror has himself by his conduct or declarations given reason to believe that he will regard the case as one involving the interests of political parties rather than the enforcement of a law designed for the protection of the public against frauds in elections. [158 U. S. 414–415.]

It is not seriously to be questioned that a juror's political preferences might well create a bias against a defendant of another political persua-

sion. Therefore in the *Connors case* it is readily to be seen that the court refused the right to counsel to interrogate prospective jurors on a proposition which might well have aided counsel for the defendant in exercising his judgment in the matter of peremptory challenge. Apparently in that case this Court was persuaded that there was some limit to the lengths to which counsel for the defendant might go in the matter of eliciting information as to possible bias or prejudice. There is no essential difference in principle between the *Connors case* and the case at bar. It would be hazardous to estimate the number of considerations in the world that might impel a juror to assume some bias against a party to a trial. There is always the possibility that some prejudice might arise from the matter of defendant's race, religion, color, political affiliation, business, place of birth, past record, appearance, fraternal connection, manner, or dress.

It would seem that a court would go to unusual lengths if it would allow prospective jurors to be interrogated as to whether they would have a bias against the defendant because defendant had forsaken religious congregation "A" to join religious congregation "B."

It would seem that the true rule is, not that a juror may be interrogated as to every consideration under the sun which might conceivably or possibly prevent him from being impartial, but that there

must be some reasonable limitation to be placed upon such questioning.

Therefore in proceeding to ascertain where the line should be drawn it is well to consider the manifest purpose of our Government in seeking to eradicate all discriminations based on race, color, or creed. It is respectfully submitted that to allow in the courts of the United States inquiries based on racial and religious prejudices would work infinite harm. With the Constitution and the statutes of the United States pointing the way to an administration of law in a manner that treats all men as equal, it would appear that the injection of topics such as these in the trial of causes would be pernicious in its effect.

Special attention is directed to that portion of the court's opinion in this case wherein it was suggested that local conditions in the District do not make necessary such inquiries. The Supreme Court of the District of Columbia and the Court of Appeals for the District are in an admirable position to judge of local conditions. And ordinarily a reviewing court will not lightly disturb a trial court on a matter wherein the trial court has exercised its discretion without manifest abuse.

Counsel for the petitioner presents no applicable Federal case. A few State cases are set forth wherein it was held proper to ask such a question. However, these cases fall into two categories. The first group comes from the Southern States, where

such a question may be regarded as possibly proper in the State courts because of the social conditions existing, as evidenced by "Jim Crow" laws and regulations dealing with residential segregation. The other group comes from the West Coast and deals with interrogatories concerning racial prejudice as against Chinese. In view of the Chinese exclusion laws, it is not difficult to appreciate the regrettable necessity of this doctrine in that section of the country.

With regard to the form of the question sought to be asked, it is interesting to note the case of *Cavitt v. The State*, 15 Texas Appeals, 190. The court, on a trial of a negro for murder, refused to permit defendant's counsel to ask a juror whether he had "the same neighborly regard for this defendant, though a negro, and his race generally, as you have for individuals of the white race?" This was held not to constitute error, the court saying (p. 199):

> It is true that proper questions to test the bias in favor of, or the prejudice against a defendant, should be allowed in examining as to the fitness of a person offered as a juror to serve as such. But a question, to be proper, should be directed to the issue as to whether or not the person proposed as a juror is impartial, and in a condition of mind and feeling to try the case fairly. We can not perceive that the question proposed by the defendant would be a proper one. If answered by the person to whom pro-

pounded in the negative, it certainly would not disqualify him as a juror, nor would it show that he was prejudiced against the defendant, or the defendant's race, nor that such person would be likely to be influenced in his verdict because he did not have the same "neighborly regard" for a negro that he had for a white man. If this were held to be sufficient cause to disqualify a person from serving as a juror, then all juries would have to be selected with reference to the race, nationality or class to which the defendant belonged; * * * So with the Mexican, the Irishman, the German; they have a greater neighborly regard for their own countrymen than for an American, and the American has a stronger neighborly regard for one of his own country than for a foreigner. This same objection as to neighborly regard would apply to *classes* as well as to races or nationalities; to farmers, merchants, mechanics, doctors, lawyers, etc. An individual generally has a stronger neighborly regard for one of his own class than for one of a different class.

CONCLUSION

An analysis of the situation presented by the refusal of the court to ask this question reveals first that the question itself was improper; second, that the question was couched in objectionable form; third, that the question could be asked in a court of the United States only with deplorable

results, by reason of its tendency to incite prejudices which are foreign to the atmosphere which the Constitution and the laws of the United States seek to maintain in the Federal courts.

It is respectfully submitted that the judgment of the Court of Appeals of the District of Columbia should be affirmed.

LEO A. ROVER,
United States Attorney.
NEIL BURKINSHAW,
Assistant United States Attorney.

The Solicitor General does not join in this brief. The United States Attorney who has signed this brief is authorized to do so, and to present the case orally in behalf of the United States.

THOMAS D. THACHER,
Acting Attorney General.

MARCH, 1931.

U. S. GOVERNMENT PRINTING OFFICE 1931

SUPREME COURT OF THE UNITED STATES.

No. 683.—October Term, 1930.

Alfred Scott Aldridge, Petitioner, *vs.* The United States of America. } On Writ of Certiorari to the Court of Appeals of the District of Columbia.

[April 20, 1931.]

Mr. Chief Justice Hughes delivered the opinion of the Court.

The petitioner was convicted, in the Supreme Court of the District of Columbia, of murder in the first degree and was sentenced to death. The conviction was affirmed by the Court of Appeals. This Court granted a writ of certiorari, limited to the question raised by the exception to the ruling of the trial court on the examination on *voir dire* of prospective jurors.

The petitioner is a negro, and the deceased was a white man, a member of the police force of the District. The record shows the following proceedings on the examination of jurors on the *voir dire*:

The court "inquired if any of them knew the defendant, Alfred Scott Aldridge, or his counsel, or any of the witnesses whose names have been called. The court further inquired if any of the prospective jurors knew any of the facts in the case or if any of them ever remembered having read of it in the newspaper, or if they had any prejudice or bias against circumstantial evidence, or if any of the prospective jurors had any conscientious scruples against capital punishment. The court further inquired if any prospective juror had formed or exercised an opinion as to the guilt or innocence of the defendant, and further inquired whether any prospective juror was acquainted with any member of the Metropolitan Police Force of the District of Columbia, or more particularly those attached to the third precinct.

"Whereupon, with the consent of the court, counsel for the parties hereto approached the bench and in a whispered tone, out of the hearing of the prospective jurors, the following took place:

"Mr. Reilly. At the last trial of this case I understand there

was one woman on the jury who was a southerner, and who said that the fact that the defendant was a negro and the deceased a white man perhaps somewhat influenced her. I don't like to ask that question in public, but—

"The Court. I don't think that would be a proper question, any more than to ask whether they like an Irishman or a Scotchman.

"Mr. Reilly. But it was brought to our attention so prominently. It is a racial question—

"The Court. It was not this jury.

"Mr. Reilly. No. But it was a racial question, and the question came up—

"The Court. I don't think that is proper.

"Mr. Reilly. Might I, out of an abundance of caution, note an exception.

"The Court. Note an exception.

"Counsel for the defendant requested the court to allow the record to show that the question relative to racial prejudice be propounded to each and every prospective juror, with the exception heretofore noted on behalf of the defendant."

In accordance with the existing practice, the questions to the prospective jurors were put by the court, and the court had a broad discretion as to the questions to be asked. The exercise of this discretion, and the restriction upon inquiries at the request of counsel, were subject to the essential demands of fairness. We find no reason to doubt the nature of the inquiry which the counsel for the accused desired. It was admitted at the bar of this Court that the members of the jury were white. In asking that the question relative to "racial prejudice" be put to the jurors, it is only reasonable to assume that counsel referred, not to immaterial matters, but to such a prejudice as would disqualify a juror because precluding an impartial verdict. The reference to what counsel had heard as to the attitude of a juror on the previous trial, where the jury had disagreed, indicated the purpose of the question, which was clear enough to invite appropriate action by the court. If the court had permitted the question, it doubtless would have been properly qualified. But the court, interrupting counsel, disposed of the inquiry summarily. The court failed to ask any question which could be deemed to cover the subject. If the defendant was entitled to have the jurors asked whether they had any racial prejudice, by reason of the fact that the defendant was a negro and the deceased a white man, which would prevent their giving

a fair and impartial verdict, we cannot properly disregard the court's refusal merely because of the form in which the inquiry was presented.

The propriety of such an inquiry has been generally recognized. In *Pinder* v. *State*, 27 Fla. 370, the counsel for the accused sought to have the jurors asked on their *voir dire*: "Could you give the defendant, who is a negro, as fair and as impartial a trial as you could a white man, and give him the same advantage and protection as you would a white man upon the same evidence?" The Supreme Court of Florida held that the refusal of the court to allow the question was error and reversed the conviction.[1] In *Hill* v. *State*, 112 Miss. 260, the Supreme Court of Mississippi held that it was fatal error to refuse to permit a negro on trial for murder to put to prospective jurors on their *voir dire* the following question: "Have you got any prejudice against the negro, as a negro, that would induce you to return a verdict on less or slighter evidence than you would return a verdict of guilty against a white man under the same circumstances?" The Supreme Court of North Carolina reversed the conviction of a negro because of the refusal of the trial judge to permit a juror to be asked if "he believed he could, as a juror, do equal and impartial justice between

[1] In the Pinder case, *supra*, the court said: "Though the question is not in express terms provided for in the statute above cited" (McClellan's Digest, sec. 10, p. 446) "yet it was a pertinent, and, as we think, proper question, to test fully the existence of bias or prejudice in the minds of the jurors. It sought to elicit a fact that was of the most vital import to the defendant; and a fact, too, that if existent, was locked up entirely within the breasts of the jurors to whom the question was propounded; a knowledge of the existence of which could only be acquired by interrogating the juror himself. The answer to it if in the affirmative could have worked no harm to the juror or to anyone else, but would have done credit to the humanity and intelligence of the juror, and would have satisfactorily exhibited to the court and to the defendant his entire competency, so far as the element of bias or prejudice was involved. But, if the answer to it from the jurors had been in the negative, then, we have no hesitancy in saying that it would have shown them to be wholly unfit and incompetent to sit upon the trial of a man of the negro race, whose right to a trial by a fair and impartial jury is as fully guaranteed to him under our constitution and laws, as to the whitest man in Christendom. And such incompetency asserts itself with superadded force in such a case as this where the life or death of the defendant was the issue to tip the scale in the jury's hands for adjustment."

the State and a colored man." *State* v. *McAfee*, 64 N. C. 339.[1] See, also, *Fendrick* v. *State*, 39 Tex. Cr., 147; *State* v. *Sanders*, 103 S. C. 216.

The practice of permitting questions as to racial prejudice is not confined to any section of the country, and this fact attests the widespread sentiment that fairness demands that such inquiries be allowed. Thus, in New York, on the trial of a negro for the murder of his wife, who was white, a talesman, who had testified to a disqualifying prejudice, was excluded by the court on its own motion, and the Court of Appeals held that the exclusion was not error, although in the absence of a challenge to the talesman by either party. *People* v. *Decker*, 157 N. Y. 186, 190. See, also, *State* v. *Brown*, 188 Mo., 451, 459, 460.

The right to examine jurors on the *voir dire* as to the existence of a disqualifying state of mind, has been upheld with respect to other races than the black race, and in relation to religious and other prejudices of a serious character. *Potter* v. *State*, 86 Tex. Cr. 380, 384; *People* v. *Reyes*, 5 Cal. 347, 349; *Watson* v. *Whitney*, 23 Cal. 375, 379; *People* v. *Car Soy*, 57 Cal. 102; *Horst* v. *Silverman* 20 Wash. 233, 234. In *People* v. *Reyes, supra*, Mexicans were charged with assault with intent to commit murder, and conviction was reversed because of the refusal to allow questions to determine whether a prospective juror was a member of the Know Nothing party, and whether he had taken any oath or obligation which resulted in prejudice, or whether independent of such an oath he entertained a prejudice, which would prevent him from giving the accused a fair trial.[2]

[1] In that case, the Court said (at p. 340): "It is essential to the purity of trial by jury, that every juror shall be free from bias. If his mind has been poisoned by prejudice of any kind, whether resulting from reason or passion, he is unfit to sit on a jury. Here, his Honor refused to allow a proper question to be put to the juror, in order to test his qualifications. Suppose the question had been allowed, and the juror had answered, that the state of his feelings toward the colored race was such that he could not show equal and impartial justice between the State and the prisoner, especially in charges of this character, it is at once seen that he would have been grossly unfit to sit in the jury box."

[2] The court in that case said (at p. 349): "As the juror best knows the condition of his own mind, no satisfactory conclusion can be arrived at, without resort to himself. Applying this test then, how is it possible to ascertain

We do not overlook the reference of the Court of Appeals, in support of the ruling of the trial court, to conditions in the District of Columbia "where the colored race is accorded all the privileges and rights under the law, that are afforded the white race, and especially the right to practice in the courts, serve on the jury, etc." But the question is not as to the civil privileges of the negro, or as to the dominant sentiment of the community and the general absence of any disqualifying prejudice, but as to the bias of the particular jurors who are to try the accused. If in fact, sharing the general sentiment, they were found to be impartial, no harm would be done in permitting the question, but if any one of them was shown to entertain a prejudice which would preclude his rendering a fair verdict, a gross injustice would be perpetrated in allowing him to sit. Despite the privileges accorded to the negro, we do not think that it can be said that the possibility of such prejudice is so remote[4] as to justify the risk in forbidding the inquiry. And this risk becomes most grave when the issue is of life or death.

The argument is advanced on behalf of the Government that it would be detrimental to the administration of the law in the courts of the United States to allow questions to jurors as to racial or religious prejudices. We think that it would be far more injurious to permit it to be thought that persons entertaining a disqualify-

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whether he is prejudiced or not, unless questions similar to the foregoing are propounded to him? . . .

"Prejudice being a state of mind more frequently founded in passion than in reason, may exist with or without cause; and to ask a person whether he is prejudiced or not against a party, and (if the answer is affirmative), whether that prejudice is of such a character as would lead him to deny the party a fair trial, is not only the simplest method of ascertaining the state of his mind, but is, probably, the only sure method of fathoming his thoughts and feelings. If the person called had not taken an obligation which would prejudice him against foreigners in such a manner as to imperil their rights in a court of law, he could say so, and the question and answer would be harmless. If, upon the other hand, he had taken oaths, and was under obligations which influenced his mind and feelings in such a manner as to deny to a foreigner an impartial trial, he is grossly unfit to sit as a juror, and such facts should be known."

[4]For an illustration of a case where the suggestion of bias was held to be too remote, *e. g.*, as to political affiliations, see Connors v. United States, 158 U. S. 408.

ing prejudice were allowed to serve as jurors and that inquiries designed to elicit the fact of disqualification were barred. No surer way could be devised to bring the processes of justice into disrepute.

We are of the opinion that the ruling of the trial court on the *voir dire* was erroneous and the judgment of conviction must for this reason be reversed.

Judgment reversed.

A true copy.

Test:

Clerk, Supreme Court, U. S.

SUPREME COURT OF THE UNITED STATES.

No. 683.—October Term, 1930.

Alfred Scott Aldridge, Petitioner, *vs.* United States of America. } On Writ of Certiorari to the Court of Appeals of the District of Columbia.

[April 20, 1931.]

The separate opinion of Mr. Justice McReynolds.

Our jurisdiction over this case is limited by Section 391, Title 28, U. S. Code, which provides—

> "All United States courts shall have power to grant new trials, in cases where there has been a trial by jury, for reasons for which new trials have usually been granted in the courts of law. On the hearing of any appeal, certiorari, writ of error, or motion for a new trial, in any case, civil or criminal, the court shall give judgment after an examination of the entire record before the court, without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties."

The petitioner, a negro, killed a white policeman in the District of Columbia. He was indicted, tried and found guilty by a jury. He moved for a new trial upon the ground, among others, "That this court committed error in refusing to examine the jury on their *voir dire* as to whether any juror may entertain racial prejudice in a matter of homicide where the defendant is a negro and the deceased a white policeman." This was overruled and sentence of death followed.

Upon appeal to the Court of Appeals for the District the following error, among others was assigned: "The court's action in refusing the request of the defendant to propound to the jury during the court's examination of the jury on its *voir dire* as to whether any juror may entertain racial prejudice in the matter of a homicide where the defendant is a negro and the deceased a white policeman."

Replying to this that court said—

> "Counsel for defendant assigns as error the refusal of the court to allow him to inquire of the prospective jurors on their voir dire whether they entertained racial prejudice in a case where in the defendant is a negro and the deceased a white man. We had occasion to consider this same question in the case of *Crawford* v. *United States*, 59 — App. D. C. —. We have given the matter further careful consideration in this case and find no reason to recede from our former decision. In a jurisdiction like the District of Columbia, where the colored race is accorded all the privileges and rights under the law, that are afforded the white race, and especially the right to practice in the courts, serve on the jury, etc., we are of the opinion that there was no abuse of discretion on the part of the trial court in refusing to permit the question to be answered by the jurors."

This Court granted a certiorari to bring up the judgment of affirmance but limited review to the point raised by the quoted assignment of error.

It appears that while the trial judge was examining prospective jurors on their *voir dire*, counsel for the accused said to him: "At the last trial of this case I understand there was one woman on the jury who was a southerner, and who said that the fact that the defendant was a negro and the deceased a white man perhaps somewhat influenced her. I don't like to ask that question in public." The precise nature of "that question" is unknown to us. The Judge thought "that question" (whatever it was) improper and refused to ask it. Whereupon counsel noted an exception and "requested the court to allow the record to show that the question relative to racial prejudice be propounded to each and every prospective juror, with the exception heretofore noted on behalf of the defendant."

Solely because of the refusal of the trial judge to propound an undisclosed question "relative to racial prejudice," (whatever that may be) we are asked to upset a judgment approved by the judges of both local courts who, it is fair to presume, understand conditions in the District better than we do.

Nothing is revealed by the record which tends to show that any juror entertained prejudice which might have impaired his ability

fairly to pass upon the issues. It is not even argued that considering the evidence presented there was room for reasonable doubt of guilt.

It does appear that counsel said he understood at a former trial a female juror, a southerner, (whatever that may mean) declared "the fact the defendant was a negro and the deceased a white man perhaps somewhat influenced her." And that is the sum of the information to be gathered from the record in respect of any "race prejudice" which might have so distorted some juror's judgment as to prevent honest and fair consideration.

How this unidentified woman juror voted; whether she was white or black; whether her prepossessions were right or wrong or materially different from those generally entertained by men of one color towards those of another; we cannot know. But "perhaps she was somewhat influenced" by the fact that the dead man and the defendant were of different color. Must we therefore decide that "perhaps" and accordingly some member of the second jury failed to act fairly, intelligently, and without due regard to his oath!

Two local courts could not conclude that there was adequate reason for holding the accused man had suffered deprivation of any substantial right through refusal by the the trial judge to ask prospective jurors something relative to racial prejudice. And certainly I am unable to affirm that they were wrong.

Section 391 of the U. S. Code, I think, was intended to prevent escape of culprits from prompt, deserved punishment in cases like this. Congress had clear right to put the limitation on courts of review and the enactment should be given effect according to its purpose.

Unhappily, the enforcement of our criminal laws is scandalously ineffective. Crimes of violence multiply; punishment walks lamely. Courts ought not to increase the difficulties by magnifying theoretical possibilities. It is their province to deal with matters actual and material; to promote order, and not to hinder it by excessive theorizing of or by magnifying what in practice is not really important.

I think the judgment below should be affirmed.